

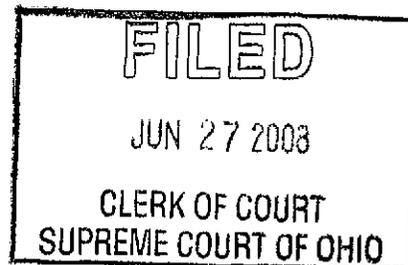
IN THE SUPREME COURT OF OHIO

State Employment Relations Board, et al. :	Case No. 2007-2269
Appellees,	
v.	On Appeal from the Hamilton
Queen City Lodge No. 69,	County Court of Appeals,
Fraternal Order of Police	First Appellate District
Appellant	Court of Appeals Case
	No. C-060782

BRIEF OF AMICUS CURIAE THE OHIO MUNICIPAL LEAGUE
URGING AFFIRMANCE ON BEHALF OF APPELLEES
THE CITY OF CINCINNATI AND
THE STATE EMPLOYMENT RELATIONS BOARD

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INTRODUCTION

The Ohio Municipal League (the “League”), as amicus curiae on behalf of the appellees the City of Cincinnati (“City”) and the State Employment Relations Board (“SERB”), urges this court to uphold the well-reasoned decision of the First District Court of Appeals, Hamilton County, which entered judgment on behalf of City and SERB and reinstated SERB’s order. *State Emp. Relations Bd. v. Queen City Lodge No. 69, Fraternal Order of Police* (2007), 174 Ohio App.3d 570, 883 N.E.2d 1083. (“Appendix i”)

The First District Court of Appeals, *inter alia*, applied the proper standard of review and deferred to SERB’s factual findings, concomitantly upholding SERB’s decision that the City’s electorate was a higher-level legislative body. Consequently, under doctrine created by SERB, the City was not required to bargain with Queen City Lodge No. 69, Fraternal Order of Police (“Union”) on a charter amendment that changed the status of the position of assistant chief of police from the classified service to the unclassified service during the term of a collective bargaining agreement.

The League asks this court to affirm the First District for three reasons. First, SERB’s administrative decisions in this case are entitled to deference. Second, SERB’s decisions were appropriate under existing collective bargaining law. Third, SERB’s classification of City’s electorate as a “higher-level legislative body” is consistent with well-established law which recognizes the primacy of municipal voters in establishing the structure of their municipal government.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League is a non-profit Ohio Corporation composed of a membership of more than 750 Ohio cities and villages.

All chartered municipalities in this state, and those which may someday become chartered, have an interest in ensuring that the voters of a municipality are permitted to establish the form of government of their municipality. Affirming the decision of the First District Court of Appeals, which reinstated the decision of SERB, will be consistent with this interest.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, all findings of fact contained within SERB Order 2005-006. ("Appendix ii.") To the extent there are matters related to the case which are not contained in the SERB order, the League hereby incorporates the positions of the City of Cincinnati on such matters.

ARGUMENT

Proposition of Law No. 1: The electorate of a municipality is a "Higher-Level Legislative Body," for purposes of Ohio's collective bargaining law.

The Ohio Municipal League concurs fully in all of the propositions of law and arguments propounded by the State Employment Relations Board and the City of Cincinnati. For the sake of brevity, the League will not restate those arguments in full, but will, instead, focus its argument to support SERB's determination that the voters of a

municipality are a “higher-level legislative body,” as contemplated under Ohio’s collective bargaining law.

The Toledo Doctrine: Higher-Level Legislative Body

As a general rule, a public employer that intends to implement a decision that affects wages, hours, and terms and conditions of employment must bargain on that issue. R.C. § 4117.08 (A). *See also Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261.

SERB, however, has created exceptions to this general rule. *In re Toledo City School Bd. of Edn.* (Oct. 1, 2001) SERB No. 2001-005, (“Appendix iii”), SERB determined that “[a] party cannot modify an existing [CBA] 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 required a change to conform * * *.” *Toledo*, at page 7 of 9.

Thus, SERB has established there are two midterm bargaining exceptions to the general rule that a public employer must bargain on issues regarding wages, hours, and the terms and conditions of employment: either immediate action is required due to exigent circumstances or legislative action is taken by a “higher-level legislative body.”

SERB's Decision: Entitled to Deference and Appropriate Under the Law

In the case at hand, SERB determined that the electorate of City was a higher-level legislative body and thus, City was excused from having to negotiate the promotion process of assistant police chiefs with Queen City Lodge No. 69, Fraternal Order of Police ("Union"). This was the correct determination for two reasons.

First, SERB's determination that City's electorate is a higher-level legislative body is entitled to deference. This Court has consistently upheld this principle of deference to SERB in matters pertaining to collective bargaining. "SERB's findings are entitled to a presumption of correctness." *Hamilton v. State Emp. Relations Bd.* (1994), 70 Ohio St.3d 210, 214, 638 N.E.2d 522. "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." *Lorain*, at 260. A decision by SERB need only be supported by substantial evidence on the record, which is an extremely low burden to meet. *Oak Hills Edn. 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).

Second, SERB's determination that the electorate of the City is a higher-level legislative body is the appropriate decision under the law as it presently stands. SERB correctly determined that the term *higher-level legislative body* is not defined under Ohio law. The term *legislative body* is defined twice in Ohio Revised Code Chapter 4117, the chapter in the Revised Code ("R.C.") pertaining to collective bargaining. However, both of those definitions are particular to the specific subsections of R.C. 4117 in which the definitions appear, as both definitions utilize the language "as used in this section." See R.C. § 4117.10 (B); R.C. § 4117.14 (C)(6)(b).

The term *higher-level legislative body* is a doctrine of SERB's creation and it is SERB's term to define, so long as the definition is consistent with the objectives of R.C. Chapter 4117. *Springfield Twp. Bd. of Trustees v. State Emp. Relations Bd.* (1990), 70 Ohio App.3d 801, 806, 592 N.E.2d 871. The Court of Appeals upheld SERB's

determination that City's electorate was a higher-level legislative body, and found that SERB's determination supported the objective of good-faith bargaining – an objective consistent with R.C. Chapter 4117.

SERB also determined that the circumstances surrounding the passage of the ordinance placing the charter amendment on the ballot was 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." *State Emp. Relations Bd. v. Queen City Lodge No. 69, Fraternal Order of Police* (2007), 174 Ohio App.3d 570, 883 N.E.2d 1083 citing *State Emp. Relations Bd. v. City of Cincinnati* (Sep. 21, 2005) SERB No. 2005-006. Court of Appeals correctly affirmed SERB's determination as consistent with the objectives of R.C. Chapter 4117 .

SERB's Determination: Consistent With Principles of Municipal Law

SERB's determination that City's electorate is a higher-level legislative body is also consistent with fundamental principles of municipal law.

The supremacy of the municipal electorate over the governmental structure of the municipality cannot be overstated. It has been recognized by the United States Supreme Court. In *City of Eastlake v. Forest City Enterprises, Inc.* (1976), 426 U.S. 668, the United States Supreme Court was presented with the question of whether a charter requirement, which called mandatory referendum vote on any change of zoning, was an improper delegation of legislative power to the electorate such that the legislative action should be held invalid. The Supreme Court held that the referendum process was not a

delegation of power from the legislature: rather, referendum was a power reserved by the electorate.

In making its determination in *Eastlake*, the Supreme Court cited James Madison's *The Federalist Papers*, and stating "[u]nder our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create." *Eastlake* at 672.

Article I, Section 2 of the Ohio Constitution echoes Madison's words:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, **and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary** ***

(Emphasis added.)

Article II, Section 1(f) of the Ohio Constitution provides, in part, that:

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

While this language in the Ohio Constitution pertains to initiative and referenda, there can be no debate that the electorate can and should be seen as body which has retained the authority, under the Constitution, to take legislative action, including the passage of proposed amendments to the City's charter. Article XVIII, Section 9 ("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.")

The electorate represents the summit in the hierarchy of American and municipal government structures. This fundamental principle of our democracy supports SERB's determination that the electorate of City is "higher-level" than Council. Thus, while referenda are not common, the Cincinnati Council's legislative decisions are always subject to the right of the people of Cincinnati to have the last word.

In addition to finding support in federal and state constitutional law, the curative value of the electorate within the municipal government structure has been recognized by this Court. In *Fox v. City of Lakewood* (1988), 39 Ohio St.3d 19, 528 N.E.2d 1254, a taxpayer and resident of the City of Lakewood brought an action against Lakewood challenging council's passage of an ordinance that placed a charter amendment on the ballot. The plaintiff asserted that the council had violated state and local open meetings laws. The charter amendment was passed by the electorate, and plaintiff sought to invalidate the ordinance and the charter amendment.

This Court held that although the Lakewood city council did in fact violate local open meetings laws, the adoption of the charter amendment by the electorate cured city council's open meeting law violation. *Fox*, at 23.

The principle established in *Fox* is directly applicable to this case. First, this Court's decision in *Fox* substantiates and solidifies the importance of the electorate in the municipal government structure. This Court determined that the decision of a city's electorate could cure council's mishaps, which might have well been fatal to the legislative action. Second, this Court's statement in *Fox* regarding the natural effects of an election, that it provides for full, free and open public debate, is pertinent herein. An election brings to light all the aspects, positive and negative, of the matter, candidate,

legislation, etc. that is the subject of the election. It provides the ultimate forum for debate and discussion. The people decided they wanted to change the structure of their government, and did so by majority vote. SERB's decision appropriately permitted the people's decision to stand, in a manner consistent with the collective bargaining law.

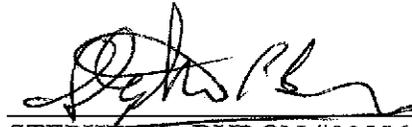
The Union has provided in its brief to this Court that the charter amendment passed by City's electorate was not actually the "will of the people;" the Union argues that, but for the city council placing the charter amendment on the ballot, the electorate would never have had the opportunity to vote on the charter amendment. This interpretation of the facts, especially in light of the analysis of the *Fox* case and the referendum process previously discussed, is misguided. The charter amendment was placed on a ballot and was subject to public scrutiny. The amendment was analyzed and debated, and in the end, the electorate chose to enact the charter amendment. Without the electorate taking action, the charter would not have been amended. Final authority rested with the people, and the initiation of the amendment, whether by city council or by petition, is of much less significance than the vote of the people. The people were given a choice, and upon public debate and discussion, the electorate chose to enact the amendment. The League asks that this choice be given the same weight by this Court as SERB, and the people of the City of Cincinnati, have given it.

CONCLUSION

The Ohio Municipal League respectfully requests this court to affirm the decision of the First District Court of Appeals to support and defer to SERB in its determination

that the City' of Cincinnati's electorate is a "higher-level legislative body" and thus not required to bargain with City regarding the promotion of assistant police chiefs.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephen L. Byron", written over a horizontal line.

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CERTIFICATE OF SERVICE

A copy of this Brief of Amicus Curiae the Ohio Municipal League Urging Affirmance on behalf of Appellees the City of Cincinnati and the State Employment Relations Board has been mailed, via regular U.S. mail, on the 26th day of June, 2008 to:

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

STATE EMPLOYMENT RELATIONS	:	APPEAL NO. C-060782
BOARD ET AL.,	:	TRIAL NOS. A-0508286
	:	A-0509296
Appellants,	:	
	:	<i>DECISION.</i>
v.	:	
QUEEN CITY LODGE NO. 69,	:	
FRATERNAL ORDER OF POLICE,	:	
Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed with Entry of Final Judgment

Date of Judgment Entry on Appeal: October 26, 2007

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Hardin, Lefton, Lazarus & Marks, L.L.C., and Stephen S. Lazarus, for appellee.

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, 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, 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.

I. 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 comprising 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 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 as follows:

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{¶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 One,” 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 One. Because the charter amendment was now in effect, the city did not follow the Rule of One 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 One. 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 One, 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.¹ 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 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

¹ See R.C. 4117.13.

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} 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."² 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. This authority must necessarily include the power to interpret the Act to achieve its purposes."³

{¶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. * * * '[S]ubstantial 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."⁴ (Emphasis added.)

² *Hamilton v. State Emp. Relations Bd.* (1994), 70 Ohio St.3d 210, 214, 638 N.E.2d 522.

³ (Citations omitted.) *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260, 533 N.E.2d 264.

⁴ *Oak Hills Edn. 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).

{¶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.⁵

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 terms-and-conditions-of-employment provision found in a collective-bargaining agreement, the collective-bargaining agreement prevails over the local law.⁶ 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} SERB reviewed the CBA and concluded that “[it] did not specify the promotional process for assistant police chiefs.” SERB relied on the finding of its ALJ, who noted that although “the filling of vacancies is indeed mentioned in Article VII, Section 22 of the [CBA], entitled “Terminal Benefits[,]” a careful reading of that provision leads to the conclusion that what is described in the [CBA] is not the

⁵ Id.

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

promotion process itself, * * * but rather a determination of the date upon which a vacancy is deemed to have occurred when a bargaining-unit member is forced to retire * * *.” Upon review of this article, we agree with SERB’s interpretation.

{¶26} The trial court indicated that because Article VII, Section 22 mentioned the filling of vacancies, SERB should have considered that before the charter amendment took effect, all officers were promoted by the Rule of One, and should have concluded that this provision governed promotions.

{¶27} But the parties stipulated to the fact that past promotions were governed by the Rule of One, 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 trial court did here was to substitute its judgment for that of SERB. That was improper. Accordingly, the trial court erred by failing to defer to SERB’s determination that there was no conflict between the charter amendment and the CBA.

{¶28} The trial court also held that the charter amendment conflicted with Article III, Section 1, which governed the grievance procedures for police officers, including assistant police chiefs. But that was not an appropriate basis for the trial court to reverse SERB’s decision. First, the charter amendment specifically provided that those currently in the position of assistant police chief would continue to remain classified and have access to the grievance procedures set forth in the CBA, which meant that the charter amendment 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, 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 One.

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.”⁷ 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 properly concluded that the city would ordinarily be required to bargain over the promotion process for assistant police chiefs.⁸

{¶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 Bd. of Edn.*⁹ was the controlling administrative

⁷ *Lorain*, supra, 40 Ohio St.3d at 261.

⁸ See *DeVennish v. Columbus* (1991), 57 Ohio St.3d 163, 566 N.E.2d 668 (holding that all matters affecting promotions are appropriate subjects of collective bargaining).

⁹ (Oct. 1, 2001), SERB No. 2001-005.

precedent governing midterm 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 * * *.”¹⁰ 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.”¹¹

{¶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} 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, 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 4117.¹² 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,

¹⁰ Id.

¹¹ Id.

¹² See *Springfield Twp. Bd. of Trustees v. State Emp. Relations Bd.* (1990), 70 Ohio App.3d 801, 806, 592 N.E.2d 871.

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 comprising 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 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 “[o]f or relating to lawmaking or to the power to enact laws,” and it defines “authority” as “[t]he right or permission to act legally on another’s behalf.”¹³ 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*. (After all, the voting public could have just as easily voted against the charter amendment.)

{¶37} 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

¹³ Black’s Law Dictionary (8th Ed.2004) 919 and 142.

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.”¹⁴

{¶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. 4117.11(A)(1) and (5). The trial 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.

VII. 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

¹⁴ *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260, 533 N.E.2d 264.

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.

VIII. 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, J., 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 fails 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 midterm 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 will 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.”¹⁵

¹⁵ *Mahoning Cty. Bd. of Mental Retardation & Developmental Disabilities v. Mahoning Cty. TMR Edn. Assn.* (1986), 22 Ohio St.3d 80, 84, 488 N.E.2d 872 .

**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.

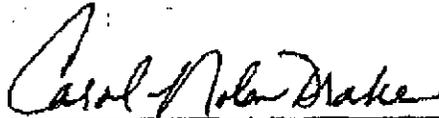
On April 10, 2003, a complaint was issued. On April 16, 2003, the Union filed a motion to intervene, which was granted in accordance with Ohio Administrative Code Rule 4117-1-07(A). On August 19, 2003, following a hearing on May 23, 2003, the Administrative Law Judge issued a Proposed Order in which 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.

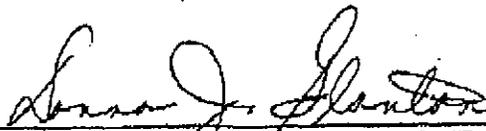
DRAKE, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.



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, 12th 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 21st 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 (1st 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.¹

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.

¹ 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."² 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

² 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, 2002.³ 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

³ 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;

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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 *Devenish 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 *Vandalla-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.

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Toledo City School District Board of Education,

Respondent.

Case No. 2000-ULP-05-0274

ORDER
(OPINION ATTACHED)

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:
September 20, 2001.

On May 1, 2000, the Toledo Association of Administrative Personnel ("Charging Party") filed an unfair labor practice charge against the Toledo City School District Board of Education ("Respondent"). On September 7, 2000, the State Employment Relations Board ("Board" or "Complainant") found probable cause to believe that the Respondent had violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

A hearing was held on December 19, 2000. On April 16, 2001, the Proposed Order was issued. On May 9, 2001, the Charging Party and the Complainant filed exceptions to the Proposed Order. On May 18, 2001, the Respondent filed a response to the Charging Party's and Complainant's exceptions. On June 21, 2001, the Board directed the representatives of the parties to appear before the Board for an oral argument on the merits of this case. On July 18, 2001, the parties' representatives presented their oral arguments to the Board.

After reviewing the record and all filings, the Board amends Conclusion of Law No. 3 by replacing "did not constitute" with "constituted" and adopts the Findings of Fact and Conclusions of Law, as amended, in the Proposed Order, incorporated by reference, for the reasons set forth in the attached Opinion, also incorporated by reference.

The Toledo City School District Board of Education is ordered to:

A. CEASE AND DESIST FROM:

- (1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by unilaterally implementing an extended school-day proposal, and from otherwise violating Ohio Revised Code Section 4117.11(A)(1); and
- (2) Refusing to bargain collectively with the exclusive representative of its employees by unilaterally implementing an extended school-day proposal, and from otherwise violating Ohio Revised Code Section 4117.11(A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Pay back pay for any hours worked over the standard work day to the Toledo Association of Administrative Personnel bargaining-unit members who worked an extension of the work day without additional compensation;
- (2) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Toledo Association of Administrative Personnel work, the Notice to Employees furnished by the State Employment Relations Board stating that the Toledo City School District Board of Education shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
- (3) Notify the State Employment Relations Board in writing within twenty calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

Order
Case No. 2000-ULP-05-0274
September 20, 2001
Page 3 of 3

It is so ordered.

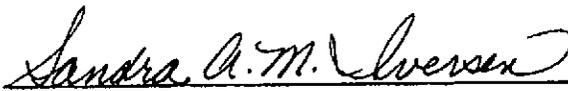
POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member,
concur.



SUE POHLER, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th 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 this document was filed and a copy served upon each party by certified mail, return receipt requested, on this 1st day of October, 2001.



SANDRA A.M. IVERSEN, ADMINISTRATIVE ASSISTANT



NOTICE TO EMPLOYEES

FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE
STATE EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the Board and to abide by the following:

A. CEASE AND DESIST FROM:

1. Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by unilaterally implementing an extended school-day proposal, and from otherwise violating Ohio Revised Code Section 4117.11(A)(1); and
2. Refusing to bargain collectively with the exclusive representative of its employees by unilaterally implementing an extended school-day proposal, and from otherwise violating Ohio Revised Code Section 4117.11(A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Pay back pay for any hours worked over the standard work day to the Toledo Association of Administrative Personnel bargaining-unit members who worked an extension of the work day without additional compensation;
2. Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Toledo Association of Administrative Personnel work, the Notice to Employees furnished by the State Employment Relations Board stating that the Toledo City School District Board of Education shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
3. Notify the State Employment Relations Board in writing twenty calendar days from the date the ORDER becomes final of the steps that have been taken to comply therewith.

SERB v. Toledo City School District Board of Education
Case No. 2000-ULP-05-0274

BY

DATE

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This Notice must remain posted for sixty consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this Notice or compliance with its provisions may be directed to the State Employment Relations Board.

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

Toledo City School District Board of Education,

Respondent.

Case No. 2000-ULP-05-0274

OPINION

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") upon the issuance of a Proposed Order on April 16, 2001, and the filing of joint exceptions by the Complainant and Toledo Association of Administrative Personnel and a response to those exceptions by the Toledo City School District Board of Education ("School Board" or "Respondent"). On July 18, 2001, the parties presented oral arguments to SERB. For the reasons below, we find that the Respondent violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it unilaterally implemented an extended school-day proposal.

I. SUMMARY OF FACTS

The Toledo Association of Administrative Personnel ("Union" or "TAAP") is the exclusive representative for a deemed-certified bargaining unit of the School Board's administrative employees. The School Board and TAAP were parties to a collective bargaining agreement effective February 1, 1998 to January 31, 2000 ("CBA"), containing

a grievance procedure that culminated in final and binding arbitration. The CBA was extended through March 31, 2001, by agreement of the parties. Article VIII addresses extended time, including extended time for the work day, and compensation for employees who work beyond their normal work day or work week. Article VIII, Section B(2)(a), is titled "Extensions of the Work Day" and states:

Extensions of the work day when students are to be present for regular coursework which are mandated by the appropriate assistant superintendent shall be compensated in a manner agreed upon by TAAP and the superintendent or his/her designee.

In 1997, the Ohio General Assembly passed Senate Bill 55. One of the effects of the legislation is to require students to complete an increased number of units in order to graduate after September 15, 2001. In order to carry out Senate Bill 55, the School Board decided to establish a program to help students who are at risk of graduating late (after September 15, 2001). On February 24, 2000, Assistant Superintendent Cotner sent a proposal to TAAP President David McClellan that would extend the school day by implementing a seven period day. The proposal contained no provision for additional compensation for the extension of the school day. On February 25, 2000, a meeting was held between representatives of TAAP and the District. Among those present were TAAP President David McClellan, Deputy Superintendent Richard Daoust, and Assistant Superintendent Craig Cotner.

On March 2, 2000, TAAP President David McClellan sent a counterproposal to Deputy Superintendent Richard Daoust and Assistant Superintendent Craig Cotner that included compensation for persons working the extended day. On March 6, 2000, Assistant Superintendent Cotner sent TAAP President McClellan a revised proposed memorandum of understanding regarding extending the high school day. The proposal contained no provision for additional compensation for TAAP members for the extension of the school day. On March 10, 2000, a negotiation meeting took place between TAAP

and the School Board; TAAP President McClellan and Assistant Superintendent Cotner were among those present. At that meeting, TAAP explained its March 2, 2000 counterproposal, and the School Board explained its March 6, 2000 counterproposal.

On March 17, 2000, Assistant Superintendent Cotner provided TAAP President McClellan with the District's proposed memorandum of understanding extending the school day for the 2000/2001 school year, and indicated that the District was going to implement the proposal over the objections of TAAP. The extended school day would begin in September 2000.

II. DISCUSSION

The Respondent is alleged to have violated O.R.C. §§ 4117.11(A)(1) and (5), which state 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 rights guaranteed in Chapter 4117. of the Revised Code[;]

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

The Complainant has the burden of demonstrating by a preponderance of the evidence that the Respondent has committed an unfair labor practice. O.R.C. § 4117.12(B)(3). Article VIII, Section B(2)(a) of the CBA states that extensions of the work day when students are to be present for regular coursework that is mandated by the appropriate assistant superintendent shall be compensated in a manner agreed upon by TAAP and the superintendent or designee. This subsection of Article VIII does not apply to the present case since the District was proposing an extra period for classes that were

remedial in nature, not regular coursework, and the extra period was only for tenth and eleventh grade students who had been identified as being at risk of not graduating with their classes. The issue presented is whether the District engaged in bad-faith bargaining when it implemented its final proposal and modified Article VIII of the CBA.

Good-faith bargaining is determined by the totality of the circumstances. *In re Dist 1199/HCSSU/SEIU, AFL-CIO*, SERB 96-004 (4-8-96). Pursuant to O.R.C. § 4117.01(G), the duty to bargain does not compel either party to agree to a proposal or require either party to make a concession. 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); *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107 (1962).

The negotiations concerning the extended school-day proposal occurred within the context of midterm bargaining. In *In re Franklin County Sheriff*, SERB 90-012 (7-18-90) ("*Franklin County Sheriff*") at pp. 3-79 — 3-80, SERB found that the language of O.R.C. Chapter 4117 establishes that the statutory dispute resolution procedure does not apply to midterm disputes. "In the absence of a settlement procedure, the Board will deal with specific incidents on a case-by-case basis." *Id.* at 3-80. In *In re SERB v. Youngstown City School Dist Bd of Ed*, SERB 95-010 (6-30-95) ("*Youngstown*"), SERB discussed the requirements for midterm bargaining over subjects not covered by the collective bargaining agreement. SERB held that an employer may implement its last, best offer when the parties have reached ultimate impasse in bargaining or when the employer has made good-faith attempts to bargain the matter before time constraints necessitated the implementation of its last, best offer. *Id.* Ultimate impasse is the point at which good faith negotiations toward reaching an agreement have been exhausted. *In re Vandalia-Butler City School Dist Bd of Ed*, SERB 90-003 (2-9-90) ("*Vandalia-Butler*"). During negotiations for a successor agreement, the employee organization may pursue issues that required mandatory midterm bargaining and were not resolved by mutual agreement as part of its overall contract negotiations, including the submission of the issues to any applicable

dispute settlement procedure that may include binding conciliation or arbitration, or the right to strike as permitted by statute. SERB has not yet addressed what standard to apply to determine whether an unfair labor practice has been committed when a party unilaterally modifies a provision in an existing collective bargaining agreement.

Under the National Labor Relations Act ("NLRA"), an employer commits an unfair labor practice if it unilaterally changes a term in an existing agreement only if the term is a mandatory subject of bargaining. Once the parties agree to permissive subjects of bargaining, those subjects continue to exist essentially at the will of either party; although civil remedies may apply, parties to a contract may rescind any permissive term of the contract at any time without violating § 8(a)(5) of the NLRA. *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185-86, (1971) ("*Pittsburgh Plate Glass*"). The midterm unilateral modification of a collective bargaining agreement is "a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining." *Pittsburgh Plate Glass, supra* at 185. See also *Pall Biomedical Products Corporation*, 331 NLRB No. 192 (2000); *Tampa Sheet Metal Company, Inc.*, 288 NLRB 322 (1988). Once agreement is reached, the terms of the written bargaining agreement are preserved and neither management [*Int'l Union v NLRB*, 246 U.S. App. D.C. 306, 310; 765 F.2d 175 (1985)] nor labor [*Teamsters Cannery Local 670 v NLRB*, 856 F.2d 1250, 1257 (CA 9, 1988)] may unilaterally modify the agreement without the consent of the other party. A minority of public-sector jurisdictions, including Illinois¹ and Pennsylvania², follows this standard.

¹*Barry Community Unit School District 1*, 15 PERI ¶ 1064 (IELRB Opinion and Order, 10-6-98); *Vienna School District No. 55 v. IELRB*, 162 Ill.App.3d 503, 515 N.E.2d 476 (4th Dist. 1987); *Service Employees International Local Union #316 v. IELRB*, 153 Ill.App.3d 744, 505 N.E.2d 418 (4th Dist. 1987); *East St. Louis School District 189*, 12 PERI ¶ 1074, Case No. 96-CA-0008-S (IELRB Opinion and Order, 9-19-96); *Kewanee Community Unit School District No. 229*, 4 PERI ¶ 1136, Case No. 86-CA-0081-C (IELRB Opinion and Order, 9-15-88).

²*Jersey Shore School District*, 18 PPER ¶ 18117 (Final Order, 1987); *Appeal of Cumberland Valley School District*, 483 Pa. 134, 394 A.2d 946 (S.Ct. 1978).

The NLRA standard is unworkable under O.R.C. Chapter 4117. Under O.R.C. § 4117.08 the continuation, modification, or deletion of an existing provision of a collective bargaining agreement is treated like a mandatory subject of bargaining regardless whether the topic would otherwise fall in the category of a mandatory or permissive subject of bargaining. In addition, § 8(d) of the NLRA specifically prohibits an employer from altering contractual terms concerning only mandatory subjects of bargaining during the life of an agreement without the consent of the union. O.R.C. § 4117.11(A)(5) does not contain similar language distinguishing between how mandatory and permissive subjects of bargaining are treated.

A majority of public-sector jurisdictions, including Florida, California, New Jersey, and Michigan, applies a form of the following standard: a party cannot modify the existing collective bargaining agreement without negotiation by and agreement of both parties. For example, the Florida Public Employees Relations Commission ("PERC") has adopted and steadfastly adheres to the principle that an employer breaches its bargaining obligation and commits a per se violation of the Florida Act if, in the absence of a clear and unmistakable waiver by the bargaining agent, it unilaterally alters the status quo with respect to the wages, hours, or other terms and conditions of employment of its employees represented by a bargaining agent.³

The majority standard is too restrictive to accomplish the purposes of O.R.C. Chapter 4117. The parties must be able to respond to emergency situations that arise during the term of the collective bargaining agreement, especially in situations where they cannot reach agreement after engaging in good-faith negotiations. O.R.C. § 4117.22

³See *Florida School for the Deaf and the Blind Teachers United v. Florida School for the Deaf and the Blind*, 11 FPER ¶ 16080 at p. 263 (1985), *aff'd*, 483 So.2d 58 (Fla. 1st DCA 1986); *City of Pinellas County PBA v. City of St. Petersburg*, 6 FPER ¶ 11277 (1980); *St. Petersburg Association of Fire Fighters, Local 747 v. City of St. Petersburg*, 5 FPER ¶ 10391, *aff'd*, 388 So.2d 1124 (Fla. 2d DCA 1980); *Indian River CEA v. School Board of Indian River County*, 4 FPER ¶ 4262 (1978), *aff'd*, 373 So.2d 412 (Fla. 4th DCA 1979).

mandates that SERB liberally construe O.R.C. Chapter 4117 "for the accomplishment of the purpose of promoting orderly and constructive relationships between all public employers and their employees." In *Franklin County Sheriff, supra* at 3-80, SERB recommended that the parties adopt procedures especially designed to deal with midterm disputes since the statutory dispute procedure did not apply.

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 became effective that requires a change to conform to the statute.

In addition, to clarify *Youngstown*, follow *Franklin County Sheriff*, 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.

In the present case, the Ohio General Assembly passed Senate Bill 55 in 1997, and the statutory change affected students who graduate from high school after September 15, 2001. The parties' CBA was effective from February 1, 1998 to January 31, 2000, and later extended through March 31, 2001. On February 24, 2000, which was nearly 2½ years after Senate Bill 55 was passed, Assistant Superintendent Cotner sent to TAAP a proposal that would extend the school day by implementing a seven-period day, but it contained no provision for additional compensation for the extension of the school day. On February 25,

2000, a meeting was held between the representatives for TAAP and the School Board. On March 2, 2000, TAAP sent a counterproposal to the School Board that included compensation for persons working the extended day. On March 6, 2000, the School Board sent to TAAP a revised proposed memorandum of understanding regarding extending the high school day; it contained no provision for additional compensation for TAAP members for the extension of the school day. On March 10, 2000, a negotiation meeting took place between TAAP and the School Board. On March 17, 2000, Assistant Superintendent Cotner provided TAAP President McClellan with the School Board's proposed memorandum of understanding extending the school day for the 2000-2001 school year, and indicated that the School Board was going to implement the proposal over the objections of TAAP beginning September 2000.

The legislative change was passed in 1997. The CBA was not effective until February 1, 1998. As a result, the parties were on notice concerning this requirement at the time they entered into the collective bargaining agreement. Since the School Board waited 2½ years after the legislative change to begin negotiating with TAAP, immediate action in 2000 was not necessitated by legislative action. The School Board implemented its proposal approximately seven months after the CBA's original expiration date, which was also approximately six months before the CBA's extension expired. These facts do not demonstrate that immediate action was required due to exigent circumstances that were unforeseen at the time of negotiations. We do not find a violation of O.R.C. §§ 4117.11(A)(1) and (A)(5) as to any individuals who did not change their work schedules or who merely adjusted their starting and ending times without any change in the number of hours worked each day. We do find that the Respondent violated O.R.C. §§ 4117.11(A)(1) and (A)(5) when it implemented its proposed memorandum of understanding that modified Article VIII of the CBA without the agreement of TAAP, resulting in bargaining-unit members working beyond the standard work day without additional compensation.

III. CONCLUSION

For the reasons above, we find that the Toledo City School District Board of Education violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) by unilaterally implementing an extended school-day proposal. As a result, a cease-and-desist order with a Notice to Employees shall be issued to the Respondent requiring it to rescind the unilateral implementation of the longer school day, thereby returning the parties to the status quo ante; to cease and desist from unilaterally implementing changes to an existing collective bargaining agreement; to pay back pay to any bargaining-unit members who worked beyond the standard work day that the bargaining-unit members worked before the unilateral implementation of the extended school-day proposal; and to post the Notice to Employees for sixty days at all locations of the Toledo City School District Board of Education where bargaining-unit members represented by the Toledo Association of Administrative Personnel work.

Gillmor, Vice Chairman, and Verich, Board Member, concur.