

JULIA L. MCNEIL (0043535)
City Solicitor

RICHARD GANULIN* (002564)

** Counsel of Record*

City of Cincinnati

801 Plum Street, Room 214

Cincinnati, Ohio 45202

513-352-3329

513-352-1515 fax

richard.ganulin@cincinnati-oh.gov

Counsel for Appellee,
City of Cincinnati

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	4
A. In the wake of racially charged violence, Cincinnati voters approved an amendment to the City Charter that altered the way the City selected its assistant police chiefs.....	4
B. The FOP filed an unfair labor practice charge when the City complied with the terms of the amended City Charter.....	6
C. SERB found that the City neither violated the CBA nor failed to bargain in good faith.....	8
D. On appeal, the First District deferred to SERB’s findings and reversed the Common Pleas Court’s order in favor of the FOP.....	9
E. In a later, separate proceeding, SERB found that the CBA applies to assistant police chiefs once they have been selected by the City Manager consistent with the Charter Amendment.....	10
ARGUMENT.....	12
 <u>SERB’s Proposition of Law No. 1:</u>	
<i>The Charter Amendment does not conflict with the collective bargaining agreement because the collective bargaining agreement is silent concerning promotions.....</i>	
A. SERB’s findings are entitled to deference and are reversed only when they are not supported by substantial evidence.....	12
B. SERB’s finding that the Charter Amendment did not conflict with the CBA is supported both by substantial evidence and by this Court’s case law.....	13
C. The grievance procedure set forth by the CBA, though not relevant to this appeal, is consistent with the Charter Amendment.....	15
 <u>SERB’s Proposition of Law No. 2:</u>	
<i>A city is not required to bargain midterm when its electorate—a “higher-level legislative body”—approves an emergency amendment to the City Charter.....</i>	

CONCLUSION.....	20
CERTIFICATE OF SERVICE	unnumbered
APPENDIX OF EXHIBITS	
Decision of the First Appellate District of Ohio, Hamilton County (October 26, 2007).....	1
State Employment Relations Board v. City of Cincinnati SERB Opinion 2007-2003 (November 30, 2007) (“Cincinnati II”).....	18
Ohio Constitution Article XVIII, Section 8.....	42
R.C. 4117.13	43
R.C. 4117.14	44

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Consolidated Edison Co. v. NLRB</i> (1938), 305 U.S. 197	12
<i>Consolo v. Federal Maritime Commission</i> (1966), 383 U.S. 607	12
<i>Donnelly v. City of Fairview Park</i> (1968), 13 Ohio St. 2d 1	18
<i>Hamilton v. SERB</i> (1994), 70 Ohio St. 3d 210	12
<i>In the Matter of Toledo City School District Board of Education</i> (2001), 2001 OPER (LRP) LEXIS 785, SERB No. 2001-005	16, 17, 18
<i>Jurcisin v. Cuyahoga County Board of Elections</i> (1988), 35 Ohio St. 3d 137	14, 15, 18
<i>Lorain City School District Board of Education v. SERB</i> (1988), 40 Ohio St. 3d 257	12
<i>Mahoning County Bd. of Mental Retardation v. Mahoning County TMR Education Association</i> (1986), 22 Ohio St. 3d 80.....	15
<i>Oak Hills Education Association v. Oak Hills Local School District Board of Education (1st Dist.)</i> , 158 Ohio App. 3d 662, 2004-Ohio-6843	12
<i>SERB v. City of Cincinnati</i> (“ <i>Cincinnati I</i> ”), SERB Opinion 2007-003 (11-29-07).....	10, 11, 16
<i>SERB v. City of Cincinnati</i> , SERB 2005-006 (9-8-05).....	6
<i>SERB v. Queen City Lodge No. 69</i> (1st Dist.), 2007-Ohio-5741	10
<i>Univ. Hosp. v. SERB</i> (1992), 63 Ohio St. 3d 339	12
<i>Vandalla-Butler City School District Board of Education</i> , SERB 90-003 (2-9-90).....	17

Constitutional Provisions, Statutes, and Rules

Page(s)

Ohio Constitution Article XVIII, § 817
R.C. 124.3713
R.C. Chapter 4117..... *passim*

INTRODUCTION

The position of Appellant Fraternal Order of Police (“FOP” or “Union”) in this case is extraordinary. The FOP asks this Court to overturn an emergency measure—the “Charter Amendment”—that Cincinnati residents enacted by citywide vote in response to race riots that rocked the city. The FOP argues that the voters’ will should be reversed because the emergency measure conflicts with the Union’s collective bargaining agreement (“CBA”) with the City of Cincinnati. But as the State Employment Relations Board (“SERB”) determined—in a finding to which deference is due—the CBA did not speak to the issue that the Charter Amendment addressed. Instead, as SERB explained, the City did not fail to bargain in good faith because the CBA was trumped by a higher legislative authority—the voters of Cincinnati.

In April 2001, a Cincinnati police officer shot to death an unarmed, nineteen-year-old black man. The death was the fifteenth fatal encounter between the Cincinnati Police Department and members of the African-American community in a six-year period. Within days, riots erupted on the streets of Cincinnati.

The Cincinnati mayor declared a state of emergency and imposed a curfew. After the four-day riots abated, the mayor announced the formation of a race-relations commission, called Cincinnati Community Action Now (“CAN”), to examine the City’s racial tensions and explore possible remedies. Composed of city religious, education, business, and community leaders, the commission was authorized to work with the City Council to implement its recommendations.

Among Cincinnati CAN’s proposals was one to alter the selection process for assistant police chiefs. At the time—by agreement rather than according to the CBA, which was silent on the subject—assistant chiefs were selected according to the “Rule of 1.” Under that rule, the department automatically elevated the highest-rated employee on a promotion-eligibility list. Cincinnati CAN recommended a change to the Cincinnati Charter that would allow the City

Manager to hire assistant police chiefs. Consistent with the commission's recommendation, the City Council passed a charter amendment and placed the matter—labeled Issue 5—on the ballot as an emergency measure for consideration by the city's residents. Cincinnati voters approved the measure, which became part of the City Charter.

When an assistant police chief position later opened up, the City Manager—consistent with the voter-approved Charter Amendment—selected a replacement rather than applying the Rule of 1. The FOP filed an unfair labor practice (“ULP”) charge, arguing that the Union's CBA with the City obligated the City to negotiate over the terms of promotions.

SERB dismissed the ULP charge. The agency found that the Charter Amendment did not conflict with the CBA regarding the promotional process, and that the CBA did not govern the dispute between the parties. Applying existing precedent, SERB then concluded that the duty to bargain mandatory subjects midterm was excused because the Charter Amendment had been enacted by a “higher-level legislative body,” the Cincinnati electorate. SERB also found that the City had not violated its obligation to bargain in good faith with the Union when it applied the law enacted by the City's voters in response to the riots.

The appeals court properly deferred to SERB's findings in holding that no ULP had occurred. SERB relied on substantial evidence in concluding that no conflict existed between the Charter Amendment and the CBA. SERB also relied on substantial evidence in straightforwardly applying its own precedent concerning emergency midterm actions by higher legislative authorities. The Ohio Constitution makes clear that a charter amendment enacted by citywide vote is a legislative action. And legislative action may, in circumstances such as this, trump collective bargaining agreements that do not address the matter at issue. To conclude

otherwise would undermine the province of the administrative agency that the General Assembly has charged with expertise in labor relations.

This Court should affirm the appeals court's decision in the narrow circumstances presented here: where the City's electorate enacted a charter amendment, in the middle of a CBA term, in circumstances that required immediate action to ameliorate community race relations.

STATEMENT OF THE CASE AND FACTS

A. In the wake of racially charged violence, Cincinnati voters approved an amendment to the City Charter that altered the way the City selected its assistant police chiefs.

On April 10, 2001, three days after a Cincinnati police officer fatally shot an unarmed, nineteen-year-old African-American man, racial tension erupted into violence in the City. (SERB Supp. 141.) The mayor declared a state of emergency and imposed a four-day curfew that succeeded in quelling the riots. On Monday, April 16, the mayor lifted the curfew and announced the formation of a community partnership to examine the roots of the violence. In particular, the mayor appointed a race-relations commission to explore problems such as housing, education, employment, neighborhood policing, and the justice system. The commission, called Cincinnati CAN, was composed of local religious, education, business, and community leaders, and it was empowered to work with the Cincinnati City Council to implement its recommendations. (SERB Supp. 5-7, 12-18, 141, 143.)

Many of the reform efforts were directed toward overhauling Cincinnati's civil service system, which governed the hiring, promotion, and termination of most of Cincinnati's municipal employees. Cincinnati community leaders focused on the Cincinnati police and fire departments in particular, and they called on the city to look nationally for new chiefs. A national search, some of the leaders argued, "would allow the selection of a chief more receptive to change and less beholden to fellow officers." (SERB Supp. 141.)

Such a search was not possible, however, under the then-existing rules for hiring and promoting public employees. Cincinnati's City Charter required that its civil service rules mirror Ohio's civil service law (SERB Supp. 139), and those rules effectively mandated in-house hiring for most management positions in the police and fire division, including the police chief.

The City considered several options for reforming the selection process for police and fire chiefs. Three different proposals emerged: one proposed by members of the City Council; one by members of “Build Cincinnati,” a group that consisted of various political and business leaders; and one by the Cincinnati City Manager. (SERB Supp. 139.) In July 2001, the City Council held meetings to discuss the three proposals to reform the City’s civil service system. (SERB Supp. 137.)

Following these discussions, two City Council members proposed a compromise emergency ordinance plan, called Issue 5, that was originally drafted by the race-relations commission, Cincinnati CAN. The City Council unanimously adopted Issue 5 as an emergency ordinance. (SERB Supp. 141, 143 - 144.) Issue 5 was placed on the November 6, 2001, ballot to be voted on by the Cincinnati electorate. The final language of the Issue 5 Charter Amendment would take 98 senior management jobs in Cincinnati city government out of the civil service system. All current employees in those positions would be grandfathered in and would remain in the civil service system as classified employees. Those positions would become unclassified only when vacated.

Under Issue 5, the unclassified employees would serve at the pleasure of the Cincinnati City Manager. The 98 positions included all division heads and all professional employees of Cincinnati’s economic development and neighborhood services departments. The measure provided, however, that the police and fire chiefs could only be fired “for cause.” (SERB Supp. 135.)

A group called “A Better Cincinnati,” which was composed of local political and religious leaders, campaigned for the passage of Issue 5. “A Better Cincinnati” was endorsed by the Greater Cincinnati Chamber of Commerce, the Urban League of Greater Cincinnati, the National

Association for the Advancement of Colored People, the Greater Cincinnati & Northern Kentucky African American Chamber of Commerce. (SERB Supp. 142.)

A majority of the Cincinnati electorate approved Issue 5 on November 6, 2001. *SERB v. City of Cincinnati*, SERB 2005-006 (9-8-05) (Appellant Apx. 38). The voters amended the City Charter to read, in relevant part:

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 chief 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.

(Appellant Supp. 51.) The position of assistant police chief became unclassified under the Charter Amendment and, under its terms, further vacancies would be filled through appointment by the Cincinnati City Manager. (Appellant Apx. 59, Finding of Fact #7.)

B. The FOP filed an unfair labor practice charge when the City complied with the terms of the amended City Charter.

When the Cincinnati electorate approved the emergency ordinance, the City, which is a “public employer” as defined by R.C. 4117.01(B), was a party to a collective bargaining agreement (“CBA”) with the Queen City Lodge No. 69, FOP, an “employee organization” as defined by R.C. 4117.01(D). The CBA applies to the police supervisors’ unit, which includes assistant police chiefs, among other classifications. This CBA was negotiated and went into effect on December 10, 2000—before the April 2001 riots—and was effective through December 31, 2002. (Appellant Apx. 59, Findings of Fact #1-3.)

The CBA did not contain a promotions provision. The parties stipulated that before the Charter Amendment passed, all promotions to a vacancy in the assistant police chief position

were made from the civil service promotional eligibility list under the “Rule of 1,” which required automatic promotion of the highest-rated employee pursuant to R.C. 124.44. (SERB Supp. 121, 130, 131; Appellant Supp. 180-186; Appellant Apx. 59-60, Finding of Fact #8.) Under the Rule of 1—which was the product of agreement, not required by the CBA’s terms—the person ranked first on the promotions eligibility list had the highest score on the promotional exam. That person was automatically promoted to the vacant assistant police chief position. (SERB Supp. 30-33.)

On September 10, 2002, Assistant Police Chief Ronald J. Twitty, who was under criminal investigation for alleged misconduct, submitted a notice of intent to retire within 90 days. (SERB Supp. 24-28, 126-127.) Twitty had previously been placed on paid administrative leave and remained on leave until his retirement became effective on December 7, 2002. (SERB Supp. 22-23, 121; Appellant Apx. 60, Finding of Fact #9.)

One of the City’s police captains, Stephen Gregoire, asserted a right to be promoted to Twitty’s position under the Rule of 1. Because the Charter Amendment was now in effect, the City did not apply the Rule of 1, and Gregoire did not receive the promotion. Gregoire filed a contractual grievance on September 10, 2002, that was ultimately denied through arbitration on January 15, 2004. The arbitrator determined that no vacancy existed when Gregoire asserted his right to be promoted. (SERB Supp. 29, 121-122, 128-130, 147-172; Appellant Apx., 40, 42, 60, Finding of Fact # 10.)

The FOP—taking a position on the promotions matter for the first time—filed a ULP charge against the City with SERB on October 17, 2002. The ULP charge alleged that the City had failed to bargain in good faith with the FOP when the City unilaterally modified the established promotional process for assistant police chiefs by applying the Charter Amendment

instead of the Rule of 1. The FOP stated that the promotion issue only became ripe when the vacancy was created by an assistant police chief's resignation on September 10, 2002. (SERB Supp. 34-119.)

C. SERB found that the City neither violated the CBA nor failed to bargain in good faith.

After the ULP was filed, the SERB staff found probable cause and ordered the parties to ULP mediation. When mediation was unsuccessful, SERB issued a complaint. The complaint alleged that the City had violated R.C. 4117.11(A)(1) and R.C. 4117.11(A)(5) in two ways: by refusing to fill a vacant assistant police chief position consistent with the CBA, and by unilaterally implementing the Charter Amendment without bargaining. (Appellant Supp. 47, ¶¶ 12-15.)

A SERB administrative law judge ("ALJ") recommended after a hearing that SERB determine that the City had committed a ULP by failing to promote Captain Gregoire to an assistant police chief position. The ALJ recommended that SERB order the City to fill vacancies from the promotional eligibility list and cease and desist from unilaterally changing the terms and conditions of employment for assistant police chiefs. (Appellant Apx. 58-68.)

The City filed exceptions to the ALJ's Proposed Order. (SERB Supp. 173-188.) While SERB's decision on the exceptions was pending, the FOP filed a second ULP against the City when the City refused to fill another vacant assistant police chief position. (SERB Supp. 189-191.) On November 5, 2004, SERB issued a probable cause finding and directed that dispute to a hearing. (SERB Supp. 192-193.)

Following oral argument, SERB dismissed the first ULP charge, ruling that the Charter Amendment did not conflict with the CBA regarding the promotional process and that the CBA did not govern the dispute between the parties. SERB then concluded that the duty to bargain

mandatory subjects midterm was excused because the Charter Amendment had been enacted by a “higher-level legislative body,” the voting public of Cincinnati. Finally, SERB found that the City had “not engaged in trickery or gamesmanship with the union,” and thus the City had not violated R.C. 4117.11(A)(1) and (A)(5) by failing to promote Captain Gregoire to a vacancy in the position of assistant police chief. (Appellant Apx. 35-36, 37-57.) SERB also dismissed the second probable cause finding, Case No. 04-ULP-07-0427, based on the dismissal of the first ULP charge. (SERB Supp. 194.)

D. On appeal, the First District deferred to SERB’s findings and reversed the Common Pleas Court’s order in favor of the FOP.

The FOP appealed both of these decisions to the Hamilton County Court of Common Pleas under R.C. 4117.13. Cincinnati was not a party to the appeal.

Following oral argument, the Common Pleas Court magistrate found that SERB should be reversed, both for dismissing the first ULP and for vacating the probable cause finding in the second ULP. The magistrate reviewed the underlying merits of the case and determined that the Charter Amendment conflicted with the CBA in two respects: with the CBA provision dealing with grievance procedures, and with Article VII, Section 22, which the magistrate construed as dealing with promotions. The magistrate then determined that, based on this conflict, the City had a duty to bargain with the FOP. The magistrate also held that the City Council committed a ULP when it passed the August 2001 ordinance that placed the Charter Amendment on the ballot. The relevant act for ULP analysis, the magistrate found, was the Council’s placing Issue 5 on the ballot, not the voters’ approval of the measure. Thus, the magistrate concluded, the Charter Amendment was not enacted by a “higher-level legislative body,” and SERB’s contrary determination was unreasonable. (Appellant Apx. 22-34.) Captain Gregoire was therefore improperly denied a promotion, the magistrate determined.

The Common Pleas Court adopted the magistrate's decision with little comment and issued an order that was timely appealed. (Appellant Apx. 20- 21.)

On appeal, the First District Court of Appeals made the City a party to the appeal. The appeals court found that the lower court failed to defer to SERB's finding that the Charter Amendment did not conflict with the CBA concerning the promotion process because the CBA was silent on the question of promotions. *SERB v. Queen City Lodge No. 69* (1st Dist.), 2007-Ohio-5741 ("App. Op."), ¶ 25.¹ The appeals court then found that SERB reasonably determined that the City had no duty to bargain with the FOP because the Cincinnati electorate's approval of Issue 5 constituted the action of a higher-level legislative authority. *Id.* at ¶ 34. The appeals court noted that "there was substantial evidence to support" SERB's determination that the City "had not acted in bad faith." *Id.* at ¶ 35. The court accordingly held that the common pleas 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 (A)(5). The Court also found that the trial court erred in determining that Captain Gregoire was entitled to be promoted to assistant chief. Thus, the Court of Appeals reinstated SERB's order that the City had not committed a ULP. *Id.* at ¶ 40.

The FOP appealed the appeals court's decision to this Court, which granted jurisdiction. (Appellant Apx. 1.)

E. In a later, separate proceeding, SERB found that the CBA applies to assistant police chiefs once they have been selected by the City Manager consistent with the Charter Amendment.

In a separate but related case that the City and SERB dubbed *Cincinnati II*, the FOP filed two ULP charges against the City on March 3, 2005, and September 1, 2005. Those two ULPs concerned the City's conduct during negotiations of a successor collective bargaining agreement,

¹ SERB has appended the First District's opinion to this brief (SERB Apx. 1) because the copy in Appellant's appendix is incomplete.

in which the City maintained that Issue 5 required all newly hired assistant police chiefs to be removed from the FOP. The parties proceeded to conciliation pursuant to R.C. 4117.14, and the conciliator ordered that the assistant police chiefs remain in the Union. Despite that decision, the City entered into individual employment contracts with newly hired assistant police chiefs.

After the appeals court's decision in this case (*Cincinnati I*), SERB determined in *Cincinnati II* that its decision in *Cincinnati I* applied only to midterm bargaining when immediate action was required because of an emergency or because of a decision made by a "higher-level legislative body." The decision in *Cincinnati I* did not apply, SERB said, during a new round of CBA negotiations. Thus, SERB found that, by refusing to negotiate on the question of the assistant chiefs' membership in the FOP, the City committed ULPs, and SERB ordered that the City afford newly hired assistant police chiefs the wages, hours, terms and conditions of employment as set forth in the CBA between the City and the Union. *SERB v. City of Cincinnati* ("*Cincinnati II*"), SERB Opinion 2007-003 (11-29-07) (SERB Apx. 18-41).

Cincinnati II is currently pending on appeal in the Hamilton County Court of Common Pleas.

ARGUMENT

SERB's Proposition of Law No. 1:

The Charter Amendment does not conflict with the collective bargaining agreement because the collective bargaining agreement is silent concerning promotions.

A. SERB's findings are entitled to deference and are reversed only when they are not supported by substantial evidence.

This Court has emphasized that “SERB’s findings are entitled to a presumption of correctness.” *Hamilton v. SERB* (1994), 70 Ohio St. 3d 210, 214. 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 agency, such as SERB, to make determinations.” *Lorain City School Dist. Bd. of Educ. v. SERB* (1988), 40 Ohio St. 3d 257, 267. “It was clearly the intention of the General Assembly to vest SERB with broad authority to administer and enforce R.C. Chapter 4117,” and “[t]his authority must necessarily include the power to interpret the Act to achieve its purposes.” *Id.*

The General Assembly in fact has mandated that SERB’s “findings . . . as to the facts, if supported by substantial evidence on the record as a whole, are conclusive.” R.C. 4117.13(B). This Court has followed suit, explaining that the common pleas court must uphold SERB’s decision if SERB’s order is supported by substantial evidence on the record.” *Univ. Hosp. v. SERB* (1992), 63 Ohio St. 3d 339, 342-43. “Substantial evidence” means “more than a mere scintilla.” *Consol. Ed. Co. v. NLRB* (1938), 305 U.S. 197, 229. It means “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* It is “a low burden” of proof. *Oak Hills Educ. Ass’n v. Oak Hills Local Sch. Dist. Bd. of Educ.* (1st Dist.), 158 Ohio App. 3d 662, 666, 2004-Ohio-6843, ¶ 12; see also *Consolo v. Fed. Mar. Comm’n* (1966), 383 U.S. 607, 619-620.

Whether SERB's judgment was supported by substantial evidence is a question of law. See *Univ. Hosp.*, 63 Ohio St. 3d at 343. "[I]t is the prerogative and the responsibility of the court entertaining the appeal to investigate whether the lower court accorded due deference to the factfinder." *Id.* "Where the common pleas court has not properly deferred to the factual determinations of the agency . . . it is within the authority of the appellate court to reverse the lower court and reinstate the order of the agency." *Id.* at 344.

B. SERB's finding that the Charter Amendment did not conflict with the CBA is supported both by substantial evidence and by this Court's case law.

The Charter Amendment was fully consistent with the CBA because the CBA did not speak to the question of promotions. The record demonstrates that SERB reviewed the CBA and concluded that "[it] did not specify the promotional process for assistant police chiefs." (Appellant Apx. 50-51.) SERB relied on the findings 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 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" (Appellant Apx. 41-43, 61.) Indeed, the parties stipulated that past promotions were governed by the Rule of 1, and as the appeals court noted, "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." App. Op. ¶ 27.

The CBA expressly referred to promotions only once, in a provision that was not relevant to this dispute. Article XX, entitled "Abolishment of Promoted Positions," vested the City Manager with authority to abolish any promoted positions in the police division in accord with R.C. 124.37 or any successor statute. (SERB Supp. 87-88.) To the extent the CBA spoke to the

issue of promotions at all, then, it provided that the City retains managerial discretion to abolish promoted positions, but that was not at issue here. SERB therefore correctly concluded 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.” (Appellant Apx. 57.)

This Court has previously considered a case much like this one: where a city’s voters amended the charter in a way that trumped a silent collective bargaining agreement. In *Jurcisin v. Cuyahoga County Board of Elections* (1988), 35 Ohio St. 3d 137, the Cleveland city council passed an emergency ordinance to place a proposed amendment on the ballot in response to an increasing number of citizen complaints of police misconduct. The appellants—Paul Jurcisin and the Cleveland Police Patrolmen’s Association (“CPPA”) and Joseph Musara and the Fraternal Order of Police, Lodge 8 (“FOP, Lodge 8”)—sought to enjoin the city council from placing the amendment before the voters. The trial court enjoined the amendment from becoming part of the charter, ruling that, under R.C. 4117.10(A), the amendment was void because it would conflict with the city’s CBAs with the CPPA and FOP Lodge 8. The appeals court reversed, holding that no conflict existed between the charter amendment and the CBAs.

Before this Court, the appellants argued that the grievance procedures contained in the CBAs conflicted with the police review board process proposed by the amendment, and that the CBAs must prevail. This Court found the proposed charter amendment would not affect the grievance procedure found in the CBAs because members of the unions would still be protected by the procedural rights designated in those agreements. *Id.* at 144. A police officer who would be disciplined as a result of a recommendation from the proposed police review board could still file a grievance to appeal the discipline. *Id.* at 144.

The Court held that Cleveland was not attempting to “disregard the terms of their collective bargaining agreements whenever they find it convenient to do so.” *Id.* at 145 (quoting *Mahoning County Bd. of Mental Retardation v. Mahoning County TMR Educ. Ass’n* (1986), 22 Ohio St. 3d 80, 84). Rather, the Court observed, “this case involves the proper exercise of management powers created by the city charter and recognized in the collective bargaining agreements.” *Id.*

Jurcisin controls this case. Under *Jurcisin*, a city is free to amend its charter by citywide vote, and that charter amendment may affect the terms of public employees unless a controlling CBA explicitly addresses the matter. Just as no CBA provision expressly governed the matter in *Jurcisin*, so, too, no CBA provision specified the promotion mechanism for assistant police chiefs in Cincinnati. The Cincinnati voters were therefore free to amend their charter concerning promotions midterm as long as immediate action was necessary.

C. The grievance procedure set forth by the CBA, though not relevant to this appeal, is consistent with the Charter Amendment.

The issue of a conflict between the grievance procedure and the Charter Amendment, pressed by the FOP here, is not relevant because this case pertains only to whether the City committed a ULP by refusing to fill a vacant assistant police chief position according to the CBA. (Appellant Apx. 37.) The limited basis for filing the ULP is demonstrated by the fact that the FOP did not submit its ULP charge until a promotion was at issue in October 2002, one year after the Charter Amendment had been enacted. The express language of the ULP charge related only to the vacancy created by the retirement of an assistant police chief and the alleged failure to promote Captain Gregoire. (SERB Supp. 34-119.) The Union did not protest any other application of the Charter amendment in its ULP filing in this case, and it did not challenge the grievance process.

Nonetheless, even assuming *arguendo* that the FOP has properly raised a potential conflict between the Charter Amendment and the CBA regarding the grievance procedure, SERB has already resolved this issue in the FOP's favor. The FOP inaccurately asserts that the Charter Amendment eliminates the CBA's just cause review of assistant police chiefs and makes them at-will employees. Appellant's Merit Br. at 10. In *Cincinnati II*, SERB found that the Cincinnati assistant police chiefs must be afforded the same wages, hours, terms, and conditions of employment as are set forth in the collective bargaining agreement. (SERB Apx. 39.) That includes the CBA's grievance procedure, which provides just-cause review. Contrary to the FOP's assertions, then, SERB has already determined that the assistant police chiefs do not become at-will employees and that just-cause review applies. Thus, even if the FOP has properly raised this issue—and it has not—no conflict exists between the Charter Amendment and the CBA grievance procedure, because SERB has already ruled in favor of the Union on this issue.

SERB's Proposition of Law No. 2:

A city is not required to bargain midterm when its electorate—a "higher-level legislative body"—approves an emergency amendment to the City Charter.

SERB disposed of this case by straightforwardly applying its own settled precedent. Under *In the Matter of Toledo City School District Board of Education* (2001), 2001 OPER (LRP) LEXIS 785, SERB No. 2001-005 ("*Toledo*"), when the parties' CBA does not specify the procedures for midterm bargaining disputes, SERB evaluates whether the employer's unilateral action constitutes a ULP according to the following standard:

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.

Toledo, slip op. at 7, available at <http://www.serb.state.oh.us/pdf/opinions/2001/op0105.pdf> (quoting *Vandalla-Butler City Sch. Dist. Bd. of Educ.*, SERB 90-003 (2-9-90)).

SERB decided this case under the second prong of the *Toledo* test, which applies only to midterm bargaining when unusual circumstances are present—such as in this case. SERB had no previous occasion to apply the second prong of the *Toledo* test pertaining to a “higher-level legislative body.” But the terms of *Toledo* are clear. To apply, the “higher-level legislative body” exception requires three elements: (1) a need for immediate midterm action; (2) legislative action by a higher-level legislative body after the CBA became effective; and (3) a need for the employer to change its practices to conform to the legislative act. Each of those elements is present here.

First, as explained above, an emergency situation in Cincinnati—deep-seated racial tensions that spilled over into rioting directed at the police department—precipitated a change in the City Charter concerning departmental promotions. The amendment was in fact proposed by a race-relations commissions that the mayor convened in the wake of the riots. See App. Op. ¶ 34 (“[T]he Charter Amendment was drafted with input from a committee comprised of citizens from the community that had been formed in response to tension between the community and the police department that had surfaced in April 2001.”). Thus, the first element of the second *Toledo* exception—a need for immediate midterm action—was satisfied.

Second, the Charter Amendment was the product of a higher-level legislative action that occurred after the CBA went into effect. Under the Ohio Constitution, the Charter is the highest governing document in the City, see App. Op. at ¶ 37 (“[T]he charter . . . is the highest authority in city governance.”), and the City’s residents may amend the charter by vote. Oh. Const. Art. XVIII, § 8. The voters’ approval of a measure that amends the Charter creates new law and is

therefore a legislative act. As this Court has explained, when “the action of a legislative body creates a law, that action is legislative.” *Donnelly v. City of Fairview Park* (1968), 13 Ohio St. 2d 1, 4. In this case, then, the voters’ amendment of the Cincinnati charter constituted a higher-level legislative action, and that action occurred after the CBA took effect, see App. Op. at ¶ 34 (“The CBA had been in effect for almost a year before the city council voted to place the Charter Amendment on the ballot . . .”).

Third, the Charter Amendment required the City to change its promotions practice. Instead of applying the Rule of 1, the City now selects assistant police chiefs through the City Manager. The third and final element of the second *Toledo* exception was therefore present.

This is not a case in which a city council agreed to a CBA and then turned around and passed an ordinance abrogating it. *Id.* at ¶ 33; see *Jurcisin*, 35 Ohio St. 3d at 145. Instead, as the appeals court noted, SERB relied on substantial evidence in finding that the City Council “did not act in bad faith in placing the Charter Amendment on the ballot.” App. Op. at ¶ 34. “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.’” *Id.* at ¶ 34.

The trial court erred when it failed to defer to SERB’s findings. *Id.* at ¶ 35. The negative effects of that error are twofold. First, it has the practical effect of tying a city’s hands and preventing it, in the middle of a CBA term, from reacting to a crisis by amending its charter by citywide vote. Second, and more broadly, it undermines the administrative capacity and expertise of the body to which the General Assembly has allocated decisions concerning labor law. See *id.* at ¶ 39.

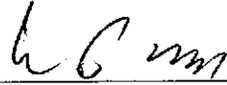
The appeals court properly performed its function here: It examined SERB's decision to determine whether it was supported by substantial evidence. Because SERB had ample support for its conclusion that the City Charter was a higher-level legislative action that did not conflict with the CBA, the appellate court correctly sustained SERB's determination.

CONCLUSION

For the above reasons, this Court should affirm the decision below.

Respectfully submitted,

NANCY H. ROGERS (0002375)
Attorney General of Ohio



WILLIAM P. MARSHALL* (0038077)
Solicitor General

**Counsel of Record*

BENJAMIN C. MIZER (0083089)
Deputy Solicitor

ANNE LIGHT HOKE (0039204)

Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

wmarshall@ag.state.oh.us

Counsel for Appellee
State Employment Relations Board

CERTIFICATE OF SERVICE

I certify that a copy of the Merit Brief of Appellee State Employment Relations Board was served this 30th day of June 2008 by regular U.S. Mail on the following:

Stephen S. Lazarus
Kimberly A. Rutowski
Hardin, Lazarus, Lewis & Marks, LLC
30 Garfield Place
Suite 915
Cincinnati, Ohio 45202

Counsel for Appellant,
Queen City Lodge No. 69,
Fraternal Order of Police

Richard Ganulin
City of Cincinnati
801 Plum Street, Room 214
Cincinnati, Ohio 45202

Counsel for Appellee
City of Cincinnati

Paul L. Cox, III
222 E. Town Street
Columbus, Ohio 43215-4611

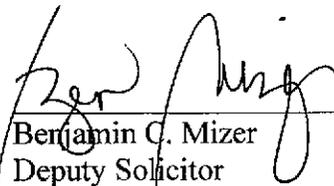
Counsel for *Amicus Curiae*
Fraternal Order of Police of Ohio, Inc.

Stephen L. Byron
Byron & Byron Co., L.P.A.
Interstate Square Bldg. I
4230 State Route 306 Suite 240
Willoughby, Ohio 44094

Counsel for *Amicus Curiae*
Ohio Municipal League

Donald L. Crain
Frost Brown Todd, LLC
300 North Main Street
Suite 200
Middletown, Ohio 45042

Counsel for *Amicus Curiae*
Ohio Public Employer Labor Relations
Association



Benjamin C. Mizer
Deputy Solicitor

APPENDIX

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

STATE EMPLOYMENT RELATIONS BOARD,	:	APPEAL NO. C-060782
	:	TRIAL NOS. A-0508286
Plaintiff-Appellant,	:	A-0509296
	:	<i>DECISION.</i>
and	:	
CITY OF CINCINNATI,	:	
Intervenor-Appellant,	:	
vs.	:	
QUEEN CITY LODGE NO. 69, FRATERNAL ORDER OF POLICE,	:	
Defendant-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

Jim Petro, Attorney General, and *Michael D. Allen*, Principal Assistant Attorney General, for Plaintiff-Appellant,

Julia L. McNeil, City Solicitor, and *Richard Ganulin*, Assistant City Solicitor, for Intervenor-Appellant, and

Hardin, Lefton, Lazarus & Marks, LLC, and *Stephen S. Lazarus*, for Defendant-Appellee.

Please note: This case has been removed from the accelerated calendar.

OHIO FIRST DISTRICT COURT OF APPEALS

MARK P. PAINTER, Presiding Judge.

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

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

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

1. The Charter Amendment

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

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

OHIO FIRST DISTRICT COURT OF APPEALS

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

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

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

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

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

OHIO FIRST DISTRICT COURT OF APPEALS

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

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

II. The ULP Charge and SERB's Decision

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

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

{¶12} The union appealed both of these decisions to the Hamilton County Court of Common Pleas.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

¹ See R.C. 4117.13.

OHIO FIRST DISTRICT COURT OF APPEALS

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

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

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

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

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

OHIO FIRST DISTRICT COURT OF APPEALS

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 [and] 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. 'Substantial evidence' is such relevant evidence that a reasonable mind might accept as adequate

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

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

OHIO FIRST DISTRICT COURT OF APPEALS

to support a conclusion, but less than the weight of the evidence. ‘Substantial evidence’ is a low burden.”⁴ (Emphasis added.)

{¶22} A trial court’s conclusion that a SERB order is not supported by substantial evidence is a legal determination, and it is fully reviewable by an appellate court.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 term-and-condition-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} The record demonstrates that SERB reviewed the CBA and concluded that “[it] did not specify the promotional process for assistant police chiefs.” SERB

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

⁵ *Id.*

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

OHIO FIRST DISTRICT COURT OF APPEALS

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 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 1, 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 1, and common sense dictates that if there had been a provision in the CBA governing promotions, the parties would not have had to stipulate to that fact. Essentially, what the 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} We briefly note that 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 we note that this 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 we note that, in actuality, the city did not apply the Charter Amendment to the CBA that was in effect when the Charter Amendment was enacted—it was determined in a separate proceeding that there was no vacant assistant-police-chief position available until after the CBA at issue had expired.) Simply because there could have been a potential conflict between the Charter Amendment and the CBA had no bearing on the issue that was before SERB, which was whether the city had committed a ULP by applying the Charter Amendment and refusing to fill a vacant assistant-police-chief position by the Rule of 1.

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

{¶29} A public employer that intends to implement a decision that “affects wages, hours, terms and conditions of employment” must bargain on that issue, “even if the question is reserved for managerial discretion.”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

⁷ *Lorain*, supra, at 533.

OHIO FIRST DISTRICT COURT OF APPEALS

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 Board of Education*⁹ was the controlling administrative precedent governing mid-term bargaining. In *Toledo*, SERB held that "[a] party cannot modify an existing [CBA] without the negotiation and by agreement of both parties unless immediate action is required due to (1) exigent circumstances that were unseen at the time of negotiations or (2) legislative action taken by a higher-level legislative body after the agreement became effective that required a change to conform * * *."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} We note that this is the first time that SERB has sought to apply the second exception in *Toledo* to a specific set of facts. And in its application, SERB construed its term "higher-level legislative body" to encompass a "higher-level legislative authority." SERB based this determination on the fact that the term "higher-level legislative body or authority" was not defined in the Ohio Revised Code,

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

⁹ (Oct. 1, 2001), SERB No. 2001-005.

¹⁰ *Id.*

¹¹ *Id.*

OHIO FIRST DISTRICT COURT OF APPEALS

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, SERB recognized that one of the objectives of R.C. Chapter 4117 is to promote good-faith bargaining.

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

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

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

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

OHIO FIRST DISTRICT COURT OF APPEALS

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

{¶36} The trial court also noted that the term “higher-level legislative body” should have been linked to the definition of “legislative body” found in R.C. 4117.10(B). But the definition of “legislative body” is specifically limited to that code section and did not apply here. We see nothing wrong with SERB’s interpretation of a “higher-level legislative authority.” Black’s Law Dictionary defines “legislative” as “of or relating to lawmaking or to the power to enact laws,” and it defines “authority” as “the right or permission to act legally on another’s behalf.”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*. (We note that the voting public could have just as easily voted against the Charter Amendment.)

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

OHIO FIRST DISTRICT COURT OF APPEALS

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

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

{¶39} As we noted earlier, in reviewing a SERB order, a trial court “must accord due deference to SERB’s interpretation of R.C. Chapter 4117. Otherwise, there would be no purpose in creating a specialized administrative agency, such as SERB, to make determinations.”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. 4711.11(A)(1) and (5). The trial

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

OHIO FIRST DISTRICT COURT OF APPEALS

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

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

VIII. Second Probable-Cause Finding

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

VII. Motion to Intervene

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

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

Judgment accordingly.

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

HILDEBRANDT, Judge, dissenting.

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

OHIO FIRST DISTRICT COURT OF APPEALS

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

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

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

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

OHIO FIRST DISTRICT COURT OF APPEALS

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

Please Note:

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

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

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Cincinnati,

Respondent.

Case Nos. 2005-ULP-03-0126 & 2005-ULP-09-0482

OPINION

MAYTON, Chairman:

This matter comes before the State Employment Relations Board ("the Board" or "SERB") upon the issuance of a Proposed Order on March 20, 2007, and the filing of exceptions to the Proposed Order by the Respondent, City of Cincinnati ("the City"), responses to the exceptions by Complainant SERB and the Intervenor, Fraternal Order of Police, Queen City Lodge No. 69 ("the FOP"), and the oral arguments presented by the parties to the Board. For the reasons that follow, the Board finds that the City violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5) in Case No. 2005-ULP-03-0126 by insisting to impasse on its proposals to remove the Assistant Police Chiefs from a deemed-certified bargaining unit, that the City violated O.R.C. §§ 4117.11(A)(1) and (A)(5) in Case No. 2005-ULP-09-0482 by unilaterally negotiating individual employment contracts with Assistant Police Chiefs Cureton and Demasi while bypassing the FOP, and that the City did not violate O.R.C. § 4117.11(A)(2).

I. BACKGROUND

The City is a charter municipality with home-rule authority as provided by the Ohio Constitution. The FOP is the deemed-certified, exclusive representative for a bargaining unit comprising all sworn members of the City's Police Division.

The City and the Union were parties to a collective bargaining agreement effective December 10, 2000 through December 31, 2002, containing a grievance procedure that culminates in final and binding arbitration. The FOP and the City were also parties to a collective bargaining agreement effective December 22, 2002 through December 18, 2004. The FOP and the City are parties to a collective bargaining agreement effective December 19, 2004 through December 2, 2006 ("successor CBA").

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, if a person holds a position in the classified civil service and that position becomes unclassified under the terms of the Charter Amendment, such person shall be deemed to hold a position in the classified civil service until he or she vacates the position; after that time the position shall be filled as an unclassified position. In this case, the position of Assistant Police Chief became unclassified under the Charter Amendment; under the Charter Amendment's terms, future vacancies would be filled through appointment by the City Manager. The Charter Amendment, also referred to as Issue 5, did not state that Assistant Police Chiefs should be removed from the deemed-certified bargaining unit.

In 2004, the FOP and the City began negotiations for the successor CBA. During negotiations, the City proposed removing all references to Assistant Police Chief from the

agreement, including the recognition clause. On November 15, 2004, the City posted a Job Opportunity for the "unclassified appointment" to the position of "Assistant Police Chief (Executive Officer)" and a second position of "Assistant Police Chief." The Assistant Police Chief (Executive Officer) position is not a bargaining unit position.

On January 4, 2005, the FOP forwarded a letter to Ursula McDonnell, the City's Supervising Human Resources Analyst, copying Jonathan Downes, the City's Chief Negotiator, indicating, among other things, that "[i]t is the FOP's position that the composition of the Bargaining Unit is under the exclusive jurisdiction of SERB and the City may not take that matter to impasse. The FOP was unwilling to proceed to impasse on any of those issues."

In the January 2005 submissions to the fact-finder, the FOP objected to the City taking bargaining-unit composition to impasse. In its January 12, 2005 submission to the fact-finder, the City proposed to delete the Lieutenant Colonel/ Assistant Police Chief from the Bargaining Unit, stating, in part:

The City proposes removing references to "Assistant Chiefs" from all sections of the Supervisors' collective bargaining agreement. The City proposes removing the positions of "Assistant Chiefs" from the Supervisors' bargaining unit altogether. Numerous compelling reasons exist for removing the Assistant Chiefs from the bargaining unit. The most compelling reason for removing the Assistant Chiefs from the bargaining unit is that it is the will of the electorate of the City. Second, the Assistant Chiefs are managerial, executive positions properly excluded from the bargaining unit. (See Jt. Exh. 1, Tab 6(A))

On February 25, 2005, the fact finder issued a report and recommendation. The fact-finding report was rejected by the FOP.

In its May 2005 submission to the Conciliator, the FOP objected to the City taking bargaining-unit composition to impasse. In its May 13, 2005 submission to the Conciliator, the City proposed grandfathering into the bargaining unit the current Assistant Police Chiefs, but removing all Assistant Police Chiefs appointed pursuant to Issue 5 from the bargaining unit, stating in part as follows:

With respect to Definitions, Article 1, Recognition, and Article 7, Section 32, Assistant Police Chiefs, the Employer proposes removing the Assistant Chief classification from the bargaining unit for employees hired or promoted to the classification after the effective date of Charter Amendment Issue 5. This proposal is necessary due to the passage of Charter Issue 5 placing the classification of Assistant Chief in the unclassified service. It is the position of the City for this Conciliation that the individuals currently serving the rank of Assistant Chief would continue to be "covered by" this Agreement (i.e. grandfathered). Once the positions in the rank of Assistant Chief become vacant, the positions would no longer be included in the bargaining unit.

The parties proceeded to conciliation, and on June 7, 2005, a conciliation award and opinion was issued. As it relates to the City's proposal to remove references to the Assistant Police Chiefs from the Supervisors' Agreement, the Conciliator awarded the FOP's position maintaining current language.

On June 22, 2005, the City announced the appointment of Captain Michael Cureton to the position of Assistant Police Chief. On July 7, 2005, the FOP filed a grievance alleging a violation of various contract provisions with regard to Assistant Police Chief Cureton's appointment to the position of Assistant Police Chief, as well as an allegation that "the agreement between Captain Cureton and the City of Cincinnati changes and/or conflicts with and/or is different from the Labor Agreement by and between the parties in the areas set forth above." Assistant Police Chief Cureton's appointment was not made from a Civil Service List for the rank of Assistant Police Chief.

On June 23, 2005, the City announced the appointment of Captain James Whalen to the position of Assistant Police Chief (Executive Officer). Assistant Police Chief Whalen's appointment was not made from a Civil Service List for the rank of Assistant Police Chief.

As a result of a lawsuit filed by Vincent Demasi, et. al., against the City of Cincinnati, et. al., in Court Case No. A0502426, the City appointed Mr. Demasi to the position of Assistant Police Chief on November 21, 2005, pursuant to the November 21, 2005 settlement agreement. On November 22, 2005, the court signed an Agreed Entry Approving Settlement and Dismissing Action. The FOP was not a party to this lawsuit or settlement agreement.

The FOP filed a grievance alleging a violation of various contract provisions with regard to Assistant Police Chief Demasi's appointment to the position of Assistant Police Chief, as well as an allegation that "the agreement between Captain Demasi and the City of Cincinnati changes and/or conflicts with and/or is different from the Labor Agreement by and between the parties in the areas set forth above." The grievance was assigned Grievance No. 27-05, and was scheduled to be arbitrated on August 30, 2006. In a letter dated November 28, 2005, the FOP requested that Assistant Police Chief Demasi's appointment be included in the unfair labor practice charge in Case No. 2005-ULP-09-0482.

Assistant Police Chiefs Cureton and Whalen each accepted the City's offer letters, which list certain wages and benefits. The offer letters also stated, in part: "The position of Assistant Police Chief is an unclassified position within the City of Cincinnati and, as a result, acceptance of this offer will result in your being considered an at-will employee." Assistant Police Chief Demasi and the City agreed, as part of a settlement of the lawsuit, Court Case No. 0502426, "to appoint Mr. Demasi to the rank of Assistant Police Chief in

the Cincinnati Police Department with his terms and conditions of such appointment to Assistant Police Chief being set forth in a letter attached to the settlement agreement and incorporated by reference," which stated, in part: "The position of Assistant Police Chief is an unclassified position within the City of Cincinnati and, as a result, acceptance of this offer will result in your being considered an at-will employee." The City did not negotiate with the FOP over the City's offer letters to Assistant Police Chiefs Cureton or Whalen. The City did not negotiate with the FOP over the City's settlement with Assistant Police Chief Demasi.

The Charter Amendment, Issue 5, states in part, "[t]he 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 Charter Amendment, Issue 5, states in part, "[t]he 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 positions become vacant after which time their positions shall be filled according to the terms of this section."

On October 25, 2004, in City Proposal #2, the City first proposed removing the Assistant Police Chief classification from Article 1, Recognition, of the parties' Supervisors' Agreement. During the fact-finding hearing, representatives of both the City and the Union met with the fact-finder and agreed to submit their positions/proposals regarding Issue 5 to the fact-finder based upon the parties' written submissions without any testimony and/or other oral presentations. The fact-finder's Report and Recommendation recommended maintaining current language in Article 1, Recognition, of the Supervisors' Agreement.

At the Cureton arbitration hearing before Arbitrator Mollie Bowers, the Union explicitly stated to Arbitrator Bowers that it was not pursuing at the arbitration hearing the

portion of the original grievance which dealt with the appointment of Mr. Cureton to the classification of Assistant Police Chief, and Arbitrator Bowers did not consider the appointment process when issuing her award regarding the grievance. On April 7, 2006, the arbitrator issued an award granting the grievance. The City moved to vacate the award in the Hamilton County Court of Common Pleas, and the Union moved to confirm the award. On February 5, 2007, the common pleas court denied the City's motion to vacate and granted the Union's motion to confirm.

The FOP had notice of Mr. Demasi's lawsuit against the City, but did not intervene in the matter. The City took no action to add the FOP as a party to the litigation.

Assistant Police Chiefs Demasi or Cureton did not file a grievance alleging any denial of a provision or benefit contained in the parties' CBA. Both Assistant Police Chiefs Demasi and Cureton were still employed by the City, and neither Assistant Police Chief had been disciplined by the City, when the parties submitted this matter for decision on Joint Stipulations of Fact and Joint Exhibits in lieu of evidentiary hearing. The FOP did not file a grievance or unfair labor practice charge contesting the \$13,000 payment to another bargaining-unit member as a result of, or concerning the promotions of other bargaining-unit employees subject to, the Agreed Entry Approving Settlement and Dismissing Action, Case No. A0502426.

On March 3, 2005, the FOP filed an unfair labor practice charge, Case No. 2005-ULP-03-0126, with SERB. On July 15, 2005, SERB determined that probable cause existed for believing the City had committed or was committing an unfair labor practice in Case No. 2005-ULP-03-0126, authorized the issuance of a complaint, and referred the matter to an expedited hearing.

On September 1, 2005, the FOP filed another unfair labor practice charge, Case No. 2005-ULP-09-0482, with SERB. On December 15, 2005, in Case No. 2005-ULP-09-0482, SERB determined that probable cause existed for believing that the City had committed an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5). SERB consolidated Case Nos. 2005-ULP-03-0126 and 2005-ULP-09-0482, authorized the issuance of a complaint, and referred the matters to hearing. On October 20, 2005, SERB vacated the direction to an expedited hearing in Case No. 2005-ULP-03-0126 and directed the matter to a hearing.

On August 29, 2006, the City filed a Complaint for Declaratory Judgment in the Hamilton County Court of Common Pleas. The case was assigned Case No. A0607369. In the Complaint, the City asked the court to determine the rights, duties, and obligations of the City and the FOP pursuant to the court entry referenced in paragraph no. 26 thereof. The City also requested a permanent injunction to enjoin the FOP from proceeding to arbitrate Grievance No. 27-05. When the parties filed the Joint Stipulations, the court had not ruled in Case No. A0607369. On December 29, 2006, the court issued an Entry Denying Plaintiff's Complaint for Declaratory Judgment in Case No. A0607369.

II. DISCUSSION

A. History of deemed-certified bargaining-unit changes

Deemed-certified bargaining units are established through a provision in the uncodified law, Section 4(A) of Am.Sub.S.B. No. 133, 140 Ohio Laws, Part I, 336, 367 [hereinafter Section 4(A)], which provides in relevant part as follows:

Exclusive recognition through a written contract, agreement, or memorandum of understanding by a public employer to an employee organization whether specifically stated or through tradition, custom, practice,

election, or negotiation the employee organization has been the only employee organization representing all employees in the unit is protected subject to the time restriction in division (B) of section 4117.05 of the Revised Code. Notwithstanding any other provision of this act, any employee organization recognized as the exclusive representative shall be deemed certified until challenged by another employee organization under the provisions of this act and the State Employment Relations Board has certified an exclusive representative.

In *Ohio Council 8, AFSCME v. Cincinnati*, 69 Ohio St.3d 677, 1994 SERB 4-37 (1994) ("*Ohio Council 8*"), the Ohio Supreme Court rejected an employer's unilateral attempt to alter the composition of a deemed-certified bargaining unit. The Court struck down an administrative rule, former Ohio Administrative Code Rule 4117-5-01(F), because it authorized adjustments or alterations to deemed-certified collective bargaining units absent a challenge by another employee organization and subsequent certification of an exclusive representative, which is forbidden by Section 4(A).

In *State ex rel. Brecksville Ed. Assn. v. SERB*, 74 Ohio St.3d 665, 1996 SERB 4-1 (1996) ("*Brecksville*"), the Ohio Supreme Court found that *Ohio Council 8* applied only to unilateral employer petitions. The Court also held at 667, 1996 SERB at 4-3, that Section 4(A) does not deprive SERB of jurisdiction to consider a petition jointly filed by an employer and an exclusive bargaining representative requesting SERB to amend the composition of a deemed-certified bargaining unit:

First and foremost, we note that the language of Section 4(A) of Am.Sub.S.B. No. 133 does not expressly protect the *composition* of the bargaining unit. [emphasis in original]. Section 4(A) provides that the deemed certified unit shall remain deemed certified until challenged by another organization. It does not exclude, expressly or otherwise, SERB jurisdiction under the facts of this case; nor does it preclude the addition of a group of employees to an existing bargaining unit *where no one opposes the action*. [emphasis added].

In *In re Groveport Madison Local School Dist Bd of Ed*, SERB 98-011 (07-23-98) ("*Groveport Madison*"), we were faced with a unilateral filing by the deemed-certified exclusive representative that was opposed by the employer, and we held:

In light of *Ohio Council 8* and *Brecksville*, we decline to act favorably on a unilateral attempt by either the employer or the exclusive representative to alter the composition of a deemed-certified bargaining unit when such an attempt is opposed by the other party. In *Brecksville*, the Court declared that cooperative solutions are the express objective of Ohio's Public Employee Collective Bargaining Law. [footnote omitted] To allow an exclusive representative to unilaterally initiate alterations to the composition of a deemed-certified bargaining unit over an employer's objections would not promote cooperative solutions and would be contrary to Section 4(A)'s express objective. Further, since *Ohio Council 8* already prevents an employer from unilaterally initiating changes in a bargaining-unit's composition to which it previously agreed, then allowing an exclusive representative to do so is inherently inconsistent and would create an imbalance in these bargaining relationships. Consequently, the Request for Recognition in the present case must be dismissed. Of course, the dismissal of this Request for Recognition does not prevent the Employee Organization from representing these employees in a separate bargaining unit.

In *Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Emp., AFL-CIO v. State Emp. Relations Bd.*, 88 Ohio St.3d 460, 2000-Ohio-370, 2000 SERB 4-13, Syllabus ("*AFSCME*"), the Ohio Supreme Court held: "A deemed certified employee representative and an employer may resolve disputes concerning bargaining unit composition through their collective bargaining agreement's grievance procedure." The Court recognized the Public Employees' Collective Bargaining Act [O.R.C. Chapter 4117] "acknowledges that certain employers and bargaining groups have long histories, predating the Act, of resolving differences through collective bargaining and through dispute resolution mechanisms such as arbitration." *Id.* at 463, 2000 SERB at 4-14. In addressing its decisions in both *Ohio Council 8* and *Brecksville*, the Court stated that "historic relationships should be allowed to agree *between themselves* about the makeup of bargaining units, or to *choose the best method of resolving differences* in that regard. (emphasis added)" *Id.*

It is against this backdrop that the City asks SERB to create a fourth method of change to deemed-certified units by allowing a party to use the statutory dispute resolution procedures of fact finding and conciliation to modify to composition of the deemed-certified bargaining unit. We find that this request is contrary to the express objective of Section 4(A) and the Ohio Supreme Court's direction. The Court allowed changes as a result of the parties agreeing "between themselves" or as the result of a collective bargaining agreement's grievance procedure. Until the parties "choose the best method of resolving differences" in their collective bargaining agreement to be the fact-finding or conciliation processes, we cannot recognize these statutory procedures for this purpose.

B. CINCINNATI

1. SERB's Opinion and Order:

In *In re City of Cincinnati*, SERB 2005-006 (9-21-2005) ("*Cincinnati I*"), the FOP filed an unfair labor practice charge against the City alleging that the City violated O.R.C. §§ 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, all of which occurred after the voters enacted the 2001 Charter Amendment. After a hearing before a SERB Administrative Law Judge, the Board ultimately found that the Cincinnati did not violate O.R.C. §§ 4117.11(A)(1) and (A)(5), dismissed the complaint, and dismissed with prejudice the unfair labor practice charge. The FOP appealed to the Court of Common Pleas of Hamilton County, which reversed the Board. *Queen City Lodge No. 69, Fraternal Order of Police v State Emp. Relations Bd.*, Court Case No. A0508286 (CP, Hamilton, 8-25-2006).

2. The Common Pleas Court's Decision:

The Common Pleas Court assigned the case to a Magistrate; after he issued his Decision and objections were filed to it, the Common Pleas Court found the objections to

the Magistrate's Decision were not well taken, accepted and adopted the Magistrate's Decision as its own without further elaboration, thereby setting aside SERB's order and remanding the matter to SERB for further adjudication consistent with the Magistrate's Decision.

The Magistrate found that the Charter Amendment directly modified the grievance procedures in the CBA when it recategorized the APC position as employment at will, thereby eliminating the protection of the grievance procedure. The Magistrate also found that the Charter Amendment modified the CBA's promotion procedures. As a result, the Magistrate found that SERB erred in holding that the Charter Amendment did not conflict with the CBA.

The Magistrate then looked at whether the conflict constituted an unfair labor practice. The Magistrate found that SERB correctly determined that the midterm changes in APC promotion procedures required collective bargaining. The Magistrate stated that the City's passing of the ordinance placing the Charter Amendment on the ballot constituted an unfair labor practice unless the ordinance fell within one of the two SERB-created exceptions under *Toledo*.

The Magistrate then reviewed SERB's finding that the voters constituted a "higher-level legislative body" under the second exception in *Toledo*. The Magistrate found SERB's definition was inconsistent with the Ohio Revised Code. The Magistrate then found that the City, by enacting the ordinance that put the Charter Amendment on the ballot, "put in motion a process which ultimately modified the existing CBA without the negotiation by and agreement of the Union." As a result, the Magistrate found the City did not have clean hands and the course of action "contradicts the spirit of, and is inconsistent with, the objectives of Chapter 4117 of the Revised Code."

3. The Court of Appeals' Decision:

On appeal, the 1st District Court of Appeals reversed the common pleas court and upheld the Board's order. *State Emp. Relations Bd. v Queen City Lodge No. 69, Fraternal Order of Police*, 2007-Ohio-5741 (1st Dist Ct App, Hamilton, 10-26-2007). The Court of Appeals determined that the common pleas court improperly reviewed SERB's decision de novo and did not properly defer to SERB's findings that were supported by substantial evidence in the record.

The Court of Appeals agreed with SERB's interpretation of the CBA article dealing with "Terminal Benefits." The Court of Appeals found that the record demonstrated that SERB reviewed the CBA and, relying upon the finding of its administrative law judge, concluded the CBA did not specify the promotional process for APCs. The parties had stipulated to the fact that past promotions were governed by the Rule of 1. The Court of Appeals reasoned that if there had been a provision in the CBA governing promotions, like the lower court found, then the parties would not have needed to stipulate to this fact. "Essentially, what the [lower] court did here was to substitute its judgment for that of SERB. That was improper."

Although the CBA contained a Management-Rights provision, the Court of Appeals found that SERB properly concluded that the City would ordinarily be required to bargain over the promotion process for APCs. The lower court agreed with SERB that the *Toledo* decision was the controlling precedent governing midterm bargaining, which contains exceptions involving "exigent circumstances" or legislative actions by a "higher-level legislative body."

SERB had found that the voters constituted a "higher-level legislative body," which encompassed a "higher-level legislative body," under the second exception in *Toledo*. SERB had based its 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. The Court of Appeals held: "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." *Id.* at ¶32, Slip Op. at p. 12.

SERB had relied on the fact that the City's electorate enacted the Charter Amendment, not the city council, in determining that these circumstances fit the second exception in Toledo. The Court of Appeals stated that "a city council cannot agree to a collective-bargaining agreement, then pass an ordinance abrogating it. But that is not what happened here." *Id.* at ¶33, Slip Op. at p. 12.

The Common Pleas Court had found SERB's definition was inconsistent with the Ohio Revised Code for two reasons. The Court of Appeals saw nothing wrong with SERB's interpretation of a "higher-level legislative authority." The Court of Appeals noted that "if the citizens of Cincinnati, in passing a charter amendment, are not a 'higher-level legislative authority,' then any charter amendment could never affect future collective bargaining. On its face, that is impossible—both the city and any union could simply ignore the charter, which is the highest authority in city governance." *Id.* at ¶37, Slip Op. at p. 14. The Court of Appeals, unlike the lower court, perceived no difference in whether the amendment was put on the ballot by council or by individuals gathering signatures; "either way, the voters have the last word." *Id.*

The Court of Appeals found that the lower court's reversal of SERB's reasonable legal interpretation of what constituted a "higher-level legislative authority" was erroneous. The Common Pleas Court had failed to defer, applied the wrong standard of review, and abused its discretion.

C. The unfair labor practice charges

O.R.C. § 4117.11 provides 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***;

(2) [D]ominate *** or interfere with the formation *** of any employee organization[;]

(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 primary issue is whether the City committed an unfair labor practice in violation of O.R.C. §§ 4117.11(A)(1), (A)(2), and (A)(5) when the City utilized the statutory impasse proceedings in an attempt to remove Assistant Police Chiefs from a deemed-certified bargaining unit.

Section 4117.01(G) defines "to bargain collectively" as follows:

"To bargain collectively" means to perform the mutual obligation of the public employer, by its representatives, and the representatives of its employees to negotiate in good faith at reasonable times and places with respect to wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, with the intention of reaching an agreement, or to resolve questions arising under the agreement. ***

The duty to bargain includes the duty to bargain in good faith. Good-faith bargaining is determined objectively using a "totality of the circumstances" test. *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).

1. The City violated O.R.C. §§ 4117.11(A)(1) and (A)(5) when it attempted to remove Assistant Police Chiefs from the supervisory bargaining unit during conciliation.

A review of all of the evidence reveals that the City refused to bargain in good faith during conciliation with the FOP. During negotiations for the successor CBA, the City rejected a tentative agreement ("TA") that would have provided for a newly negotiated agreement and continued to include the Assistant Police Chiefs in the deemed-certified bargaining unit. During fact finding under O.R.C. § 4117.14, the City continued to propose to remove any and all references to APCs from the Agreement. The fact finder rejected these arguments and recommended affirmation of the TA. The FOP rejected the fact-finder's report.

After the rejection of a fact-finding report, O.R.C. § 4117.14 provides in relevant part as follows:

(D) If the parties are unable to reach agreement within seven days after the publication of findings and recommendations from the fact-finding panel or the collective bargaining agreement, if one exists, has expired, then the:

(1) Public employees, who are members of a police or fire department, members of the state highway patrol, deputy sheriffs, dispatchers employed by a police, fire or sheriff's department or the state highway patrol or civilian dispatchers employed by a public employer other than a police, fire, or sheriff's department to dispatch police, fire, sheriff's department, or emergency medical or rescue personnel and units, an exclusive nurse's unit, employees of the state school for the deaf or the state school for the blind, employees of any public employee retirement system, corrections officers, guards at penal or mental institutions, special police officers appointed in accordance with sections 5119.14 and 5123.13 of the Revised Code, psychiatric attendants employed at mental health forensic facilities, or youth leaders employed at juvenile correctional facilities, shall submit the matter to a final offer settlement procedure pursuant to a board order issued forthwith to the parties to settle by a conciliator selected by the parties. The parties shall request from the board a list of five qualified

conciliators and the parties shall select a single conciliator from the list by alternate striking of names. If the parties cannot agree upon a conciliator within five days after the board order, the board shall on the sixth day after its order appoint a conciliator from a list of qualified persons maintained by the board or shall request a list of qualified conciliators from the American arbitration association and appoint therefrom.

(2) Public employees other than those listed in division (D)(1) of this section have the right to strike under Chapter 4117. of the Revised Code[.]

After the rejection of the fact-finding report, the parties moved to conciliation under O.R.C. § 4117.14(D)(1). At conciliation, the City continued to propose that the Assistant Police Chiefs be removed from the bargaining unit. It is at this point that the City engaged in bad faith bargaining. The City's proposal was rejected by the conciliator, who wrote as follows: "The Fact-Finder's recommendation stands. The language in the most recent CBA stays and the FOP's position to maintain the current language in the Definition and Recognition section of the contract is ordered."

An objective review of the City's conduct results in the determination that the City violated O.R.C. §§ 4117.11(A)(1)¹ and (A)(5) by insisting to impasse on its proposal to remove the Assistant Police Chiefs from the bargaining unit. Citing Section 4(A), SERB has held that a deemed-certified representative cannot be displaced except by a competing employee organization. *In re Univ of Cincinnati*, SERB 85-022 (5-24-85). SERB also has rejected several attempts by unions to unilaterally petition for the modification of a deemed-certified bargaining unit. *In re Groveport Madison Local School Dist. Bd. of Ed.*, SERB 98-011 (1998). See also, *In re Urbana City School Dist. Bd. of Ed.*, SERB 98-012 (1998). In *In re Cuyahoga County Human Services Dept*, SERB 98-008 (4-30-98) ("*Cuyahoga*"), SERB set forth the standard under which employees can be severed

¹The O.R.C. § 4117.11(A)(1) allegation is a derivative violation of O.R.C. § 4117.11(A)(5) in this instance. *In re Amalgamated Transit Union, Local 268*, SERB 93-013 (6-25-93) at n.14.

from deemed-certified bargaining units, holding that absent evidence of substantial changes or of inadequate, disparate representation by an employee organization, no basis exists for granting a severance petition.

The Ohio Supreme Court also has addressed the circumstances under which parties can achieve changes to the composition of deemed-certified bargaining units. Initially, the Court held that O.R.C. Chapter 4117 allows changes to a deemed-certified bargaining unit upon challenge by and subsequent certification of a rival employee organization. *Ohio Council 8*, supra. In *Brecksville*, supra, the Court held that a deemed-certified employee organization and an employer could agree, through a petition jointly filed with SERB, to ask SERB to amend the composition of a deemed-certified bargaining unit. Finally, in *AFSCME*, supra at Syllabus, the Court held: "A deemed certified employee representative and an employer may resolve disputes concerning bargaining unit composition through their collective bargaining agreement's grievance procedure. (emphasis added)"

Key to the Court's holding in *AFSCME* was the principle that orderly and cooperative resolution of disputes and the policy interest of stability in labor relationships is furthered when the parties "agree between themselves about the makeup of bargaining units, or * * * choose the best method of resolving differences in that regard." *Id.* In *AFSCME*, the parties' choice of the grievance process to resolve disputes over bargaining-unit composition was evident because the collective bargaining agreement at issue contained language specifying when newly-created positions would be added to the bargaining unit. When the employer created a new position but did not place it in the bargaining unit, the employee organization filed a grievance alleging a violation of this specific contract language. Ultimately, an arbitrator resolved the parties' dispute. The Court held that O.R.C. Chapter 4117 was not violated when the parties used the grievance-arbitration process to resolve their bargaining-unit dispute. *Id.*

The recognition clause in the 2002-2004 CBA does not set forth any agreement between the FOP and the City regarding amendments to the composition of the deemed-certified bargaining unit. Rather, the clause states that the City agrees to recognize the FOP as the exclusive representative of the previously-defined "sworn members" of the City's Police Department. Thus, this language does not reflect the parties' agreement upon a process to amend the composition of the bargaining unit.

The mere recitation in a recognition clause of the positions contained in a bargaining unit, whether deemed certified or Board certified, does not, without more, make the composition of the bargaining unit a mandatory subject of collective bargaining. Cases decided under the National Labor Relations Act ("NLRA") are persuasive in this regard. As noted by the U.S. Second Circuit Court of Appeals in a case arising under the NLRA:

The statute imposes on labor and management alike a duty to bargain in good faith with respect to wages, hours and other conditions of employment...This duty "does not compel either party to agree to a proposal," as Section 8(d) states, "or require the making of a concession," and the [National Labor Relations] Board ["NLRB"] has no power to settle any of those questions. By way of contrast, it not only has power, but is indeed directed, to decide what is the appropriate bargaining unit in each case.

Douds v. Longshoremen (ILA), 241 F.2d 278, 282 (2d. Cir. 1957). Thus, the scope of the bargaining unit is a permissive, not a mandatory, subject of bargaining. Further, while under the NLRA a bargaining unit may be altered by agreement of the parties, it is an unfair labor practice for either party to insist to impasse on a permissive proposal that employees be added to or excluded from a certified bargaining unit. *Id.*; *Salt River Valley Water Users' Ass'n*, 204 NLRB 83 (1973), *enfd.*, 498 F.2d 393 (9th Cir. 1974); *United Technologies Corp.*, 292 NLRB 248 (1989), *aff'd.*, 884 F.2d 1569 (2d Cir. 1989). We concur with this reasoning.

Therefore, we find that, under Section 4(A) and O.R.C. Chapter 4117, it is an unfair labor practice for either party to insist to impasse on a permissive proposal that employees be added to or excluded from a deemed-certified bargaining unit. Thus, we further find in the present case that the City violated O.R.C. §§ 4117.11(A)(1) and (A)(5) by insisting to impasse on its proposal to remove the Assistant Police Chiefs from the bargaining unit.

2. The City violated O.R.C. §§ 4117.11(A)(1) and (A)(5) when it bypassed the FOP and negotiated individual employment contracts with certain Assistant Police Chiefs.

After the conciliator's award was issued, the City, essentially ignoring the terms of the successor CBA, entered into employment contracts directly with certain Assistant Police Chiefs without duly negotiating with the FOP. On June 22, 2005, the City entered into a contract with Captain Cureton, which provided for him to become an Assistant Police Chief. This employment contract was entered into without any discussion or negotiation with the FOP. Furthermore, the contract contains provisions that directly contradict the existing supervisors' collective bargaining agreement, including, among other items, different residency requirements and disciplinary provisions. The City entered into a similarly worded contract with Captain Demasi, also without negotiating with the FOP.

The City entered into Captain Demasi's individual employment contract as part of a settlement of a common pleas court action filed against the City by individual employees. In this action, the City filed memoranda with the court stating that the Assistant Police Chief positions (other than Executive Officer) were within the FOP bargaining unit. The City claims that the FOP waived its right to challenge the individual employment contract entered into in settlement of this litigation. The FOP was not a party to this action, and the City never invited the FOP to participate in the settlement negotiations. Indeed, the parties stipulated that the FOP was not involved in the negotiations leading to the individual employment contracts reached with APCs Cureton and Demasi. In neither instance did the City have the right to unilaterally avoid its obligations under the CBA.

The recognition clause of the CBA provided in part as follows:

"Exclusive bargaining rights" shall be interpreted to mean that the City shall not negotiate, meet or confer with any person, group of persons, associations or unions other than the Fraternal Order of Police, Queen City Lodge No. 69, for purpose of effecting or attempting to effect a change in the terms of this Agreement as it applies to any provision of this contract, and shall not permit any City employee or agent to adopt or continue any policy, procedure or program which is in conflict with any provision of this contract.

The Ohio Supreme Court has held that an employer has a duty to bargain collectively and exclusively with the designated exclusive representative of a bargaining unit. *State Emp. Relations Bd. v. Miami Univ.* (1994), 71 Ohio St.3d 351, 1995 SERB 4-1. This duty extends unless and until the employee organization is no longer the exclusive representative. *Id.* In *In re Findlay City School Dist. Bd. of Ed.*, SERB 88-006 (1988), the employer, as here, bypassed the exclusive representative and negotiated directly with employees, and we found a violation because the employer ignored its obligation to bargain with the union.

The parties have stipulated that the FOP has at all relevant times been the exclusive bargaining representative, having never waived that right nor relinquished it upon challenge. To simply avoid its responsibility to negotiate with the exclusive representative of the Assistant Police Chiefs, as the City has done, is an attempt to abrogate the obligations set forth in O.R.C. Chapter 4117. Therefore, we find that the City violated O.R.C. §§ 4117.11(A)(1)² and (A)(5) when it refused to bargain with the exclusive representative of its employees by directly negotiating individual employment contracts for Assistant Police Chiefs covered by a collective bargaining agreement with the FOP.

² The O.R.C. § 4117.11(A)(1) allegation is a derivative violation of O.R.C. § 4117.11(A)(5) in this instance. *In re Amalgamated Transit Union, Local 268*, SERB 93-013 (6-25-93) at n.14.

3. The City did not violate O.R.C. § 4117.11(A)(2).

The record does not contain any facts to support the allegation that the City became involved in the internal administration or leadership of the FOP. The records also does not indicate that the City, by requesting changes to the composition of an FOP bargaining unit, has interfered with the formation of the employee organization itself. The facts of this case are readily distinguishable from those of *In re Pierce Twp, Clermont County*, SERB 2001-008 (12-12-01), in which SERB found an O.R.C. § 4117.11(A)(2) violation when the employer took action to eliminate all positions within a local union's proposed bargaining unit while a Petition for Representation Election was pending. Therefore, the City did not violate O.R.C. § 4117.11(A)(2) when it bypassed the FOP and negotiated individual employment contracts with certain Assistant Police Chiefs. Since Complainant and Intervenor have failed to meet their burden of proof for this allegation, it is dismissed.

D. REMEDY

The parties will be ordered to return to the status quo ante effective June 7, 2005, the date on which the conciliation award and opinion was issued, to remedy the City's unilateral acts. Consequently, the City must rescind the individual employment contracts with Assistant Police Chiefs Cureton and Demasi and afford these employees the wages, hours, and terms and conditions of employment set forth in the current collective bargaining agreement between the City and the FOP. In addition, a cease-and-desist order will be issued, along with a Notice to Employees, to be posted by the City for sixty days where employees represented by the FOP work.

III. CONCLUSION

For the reasons set forth above, the Board finds that the City of Cincinnati violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) in Case No. 2005-ULP-03-0126 by insisting to impose on its proposals to remove the Assistant Police Chiefs from a deemed-certified bargaining unit, that the City violated O.R.C. §§ 4117.11(A)(1) and (5) in Case No. 2005-ULP-09-0482 by unilaterally negotiating individual employment contracts with Assistant Police Chiefs Cureton and Demasi while bypassing the FOP, and that the City did not violate O.R.C. § 4117.11(A)(2). As a result, a cease-and-desist order will be issued, along with a Notice to Employees, to be posted by the City for sixty days where employees represented by Fraternal Order of Police, Queen City Lodge No. 69 work, and the order will require the parties to return to the status quo ante effective June 7, 2005, the date on which the conciliation award and opinion was issued.

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

SERB

"Promoting Orderly and Constructive
Labor Relations Since 1964"

State
Employment
Relations
Board



65 East State Street, 12th Floor
Columbus, Ohio 43215-4213
Phone 614.644.8573
Fax 614.466.3074
www.serb.state.oh.us

Craig R. Mayton, J.D., Chairman
Karen L. Gilmor, Ph.D., Vice Chairman
Michael G. Verich, J.D., Board Member

Ted Strickland, Governor

Arthur J. Merziale, Jr., J.D., Executive Director

CERTIFICATION

I, the undersigned General Counsel and Assistant Executive Director for the State Employment Relations Board, hereby certify that the attached document is a true and exact reproduction of the original Order (with Opinion Attached) of the State Employment Relations Board entered on its journal on the 30th day of November, 2007.

J. Russell Keith
General Counsel and Assistant Executive Director
November 30, 2007

Oh. Const. Art. XVIII, § 8 (2008)

§ 8. Submission of question of election of charter commission; approval

The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, "Shall a commission be chosen to frame a charter." The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein.

History:

(Adopted September 3, 1912.)

4117.13 Board or party may petition court of common pleas.

(A) The state employment relations board or the complaining party may petition the court of common pleas for any county wherein an unfair labor practice occurs, or wherein any person charged with the commission of any unfair labor practice resides or transacts business, for the enforcement of the order and for appropriate temporary relief or restraining order. The board shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and evidence upon which the order was entered and the findings and order of the board. When the board petitions the court, the complaining party may intervene in the case as a matter of right. Upon the filing, the court shall cause notice thereof to be served upon the person charged with committing the unfair labor practice and thereupon has jurisdiction of the proceeding and the question determined therein. The court may grant the temporary relief or restraining order it deems just and proper, and make and enter upon the pleadings, evidence, and proceedings set forth in the transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board.

(B) The findings of the board as to the facts, if supported by substantial evidence, on the record as a whole, are conclusive. If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there exist reasonable grounds for the failure to adduce the evidence in the hearing before the board, its member or agent, the court may order the board, its member, or agent to take the additional evidence, and make it a part of the transcript. The board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file the modified or new findings, which, if supported by the evidence, are conclusive and shall file its recommendations, if any, for the modifying or setting aside of its original order.

(C) The jurisdiction of the court is exclusive and its judgment and decree final, except that the same is subject to review on questions of law as in civil cases.

(D) Any person aggrieved by any final order of the board granting or denying, in whole or in part, the relief sought may appeal to the court of common pleas of any county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, by filing in the court a notice of appeal setting forth the order appealed from and the grounds of appeal. The court shall cause a copy of the notice to be served forthwith upon the board. Within ten days after the court receives a notice of appeal, the board shall file in the court a transcript of the entire record in the proceeding, certified by the board, including the pleading and evidence upon which the order appealed from was entered.

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

(E) The commencement of proceedings under division (A) or (D) of this section does not, unless specifically ordered by the court, operate as a stay of the board's order.

(F) Courts of common pleas shall hear appeals under Chapter 4117. of the Revised Code expeditiously presented and where good cause is shown give precedence to them over all other civil matters except earlier matters of the same character.

Effective Date: 04-01-1984

4117.14 Settlement of dispute between exclusive representative and public employer - procedures.

(A) The procedures contained in this section govern the settlement of disputes between an exclusive representative and a public employer concerning the termination or modification of an existing collective bargaining agreement or negotiation of a successor agreement, or the negotiation of an initial collective bargaining agreement.

(B)(1) In those cases where there exists a collective bargaining agreement, any public employer or exclusive representative desiring to terminate, modify, or negotiate a successor collective bargaining agreement shall:

(a) Serve written notice upon the other party of the proposed termination, modification, or successor agreement. The party must serve the notice not less than sixty days prior to the expiration date of the existing agreement or, in the event the existing collective bargaining agreement does not contain an expiration date, not less than sixty days prior to the time it is proposed to make the termination or modifications or to make effective a successor agreement.

(b) Offer to bargain collectively with the other party for the purpose of modifying or terminating any existing agreement or negotiating a successor agreement;

(c) Notify the state employment relations board of the offer by serving upon the board a copy of the written notice to the other party and a copy of the existing collective bargaining agreement.

(2) In the case of initial negotiations between a public employer and an exclusive representative, where a collective bargaining agreement has not been in effect between the parties, any party may serve notice upon the board and the other party setting forth the names and addresses of the parties and offering to meet, for a period of ninety days, with the other party for the purpose of negotiating a collective bargaining agreement.

If the settlement procedures specified in divisions (B), (C), and (D) of this section govern the parties, where those procedures refer to the expiration of a collective bargaining agreement, it means the expiration of the sixty-day period to negotiate a collective bargaining agreement referred to in this subdivision, or in the case of initial negotiations, it means the ninety day period referred to in this subdivision.

(3) The parties shall continue in full force and effect all the terms and conditions of any existing collective bargaining agreement, without resort to strike or lock-out, for a period of sixty days after the party gives notice or until the expiration date of the collective bargaining agreement, whichever occurs later, or for a period of ninety days where applicable.

(4) Upon receipt of the notice, the parties shall enter into collective bargaining.

(C) In the event the parties are unable to reach an agreement, they may submit, at any time prior to forty-five days before the expiration date of the collective bargaining agreement, the issues in dispute to any mutually agreed upon dispute settlement procedure which supersedes the procedures contained

In this section.

(1) The procedures may include:

(a) Conventional arbitration of all unsettled issues;

(b) Arbitration confined to a choice between the last offer of each party to the agreement as a single package;

(c) Arbitration confined to a choice of the last offer of each party to the agreement on each issue submitted;

(d) The procedures described in division (C)(1)(a), (b), or (c) of this section and including among the choices for the arbitrator, the recommendations of the fact finder, if there are recommendations, either as a single package or on each issue submitted;

(e) Settlement by a citizens' conciliation council composed of three residents within the jurisdiction of the public employer. The public employer shall select one member and the exclusive representative shall select one member. The two members selected shall select the third member who shall chair the council. If the two members cannot agree upon a third member within five days after their appointments, the board shall appoint the third member. Once appointed, the council shall make a final settlement of the issues submitted to it pursuant to division (G) of this section.

(f) Any other dispute settlement procedure mutually agreed to by the parties.

(2) If, fifty days before the expiration date of the collective bargaining agreement, the parties are unable to reach an agreement, any party may request the state employment relations board to intervene. The request shall set forth the names and addresses of the parties, the issues involved, and, if applicable, the expiration date of any agreement.

The board shall intervene and investigate the dispute to determine whether the parties have engaged in collective bargaining.

If an impasse exists or forty-five days before the expiration date of the collective bargaining agreement if one exists, the board shall appoint a mediator to assist the parties in the collective bargaining process.

(3) Any time after the appointment of a mediator, either party may request the appointment of a fact-finding panel. Within fifteen days after receipt of a request for a fact-finding panel, the board shall appoint a fact-finding panel of not more than three members who have been selected by the parties in accordance with rules established by the board, from a list of qualified persons maintained by the board.

(a) The fact-finding panel shall, in accordance with rules and procedures established by the board that include the regulation of costs and expenses of fact-finding, gather facts and make recommendations for the resolution of the matter. The board shall by its rules require each party to specify in writing the unresolved issues and its position on each issue to the fact-finding panel. The fact-finding panel shall

make final recommendations as to all the unresolved issues.

(b) The board may continue mediation, order the parties to engage in collective bargaining until the expiration date of the agreement, or both.

(4) The following guidelines apply to fact-finding:

(a) The fact-finding panel may establish times and place of hearings which shall be, where feasible, in the jurisdiction of the state.

(b) The fact-finding panel shall conduct the hearing pursuant to rules established by the board.

(c) Upon request of the fact-finding panel, the board shall issue subpoenas for hearings conducted by the panel.

(d) The fact-finding panel may administer oaths.

(e) The board shall prescribe guidelines for the fact-finding panel to follow in making findings. In making its recommendations, the fact-finding panel shall take into consideration the factors listed in divisions (G)(7)(a) to (f) of this section.

(f) The fact-finding panel may attempt mediation at any time during the fact-finding process. From the time of appointment until the fact-finding panel makes a final recommendation, it shall not discuss the recommendations for settlement of the dispute with parties other than the direct parties to the dispute.

(5) The fact-finding panel, acting by a majority of its members, shall transmit its findings of fact and recommendations on the unresolved issues to the public employer and employee organization involved and to the board no later than fourteen days after the appointment of the fact-finding panel, unless the parties mutually agree to an extension. The parties shall share the cost of the fact-finding panel in a manner agreed to by the parties.

(6)(a) Not later than seven days after the findings and recommendations are sent, the legislative body, by a three-fifths vote of its total membership, and in the case of the public employee organization, the membership, by a three-fifths vote of the total membership, may reject the recommendations; if neither rejects the recommendations, the recommendations shall be deemed agreed upon as the final resolution of the issues submitted and a collective bargaining agreement shall be executed between the parties, including the fact-finding panel's recommendations, except as otherwise modified by the parties by mutual agreement. If either the legislative body or the public employee organization rejects the recommendations, the board shall publicize the findings of fact and recommendations of the fact-finding panel. The board shall adopt rules governing the procedures and methods for public employees to vote on the recommendations of the fact-finding panel.

(b) 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.

(D) If the parties are unable to reach agreement within seven days after the publication of findings and recommendations from the fact-finding panel or the collective bargaining agreement, if one exists, has expired, then the:

(1) Public employees, who are members of a police or fire department, members of the state highway patrol, deputy sheriffs, dispatchers employed by a police, fire or sheriff's department or the state highway patrol or civilian dispatchers employed by a public employer other than a police, fire, or sheriff's department to dispatch police, fire, sheriff's department, or emergency medical or rescue personnel and units, an exclusive nurse's unit, employees of the state school for the deaf or the state school for the blind, employees of any public employee retirement system, corrections officers, guards at penal or mental institutions, special police officers appointed in accordance with sections 5119.14 and 5123.13 of the Revised Code, psychiatric attendants employed at mental health forensic facilities, or youth leaders employed at juvenile correctional facilities, shall submit the matter to a final offer settlement procedure pursuant to a board order issued forthwith to the parties to settle by a conciliator selected by the parties. The parties shall request from the board a list of five qualified conciliators and the parties shall select a single conciliator from the list by alternate striking of names. If the parties cannot agree upon a conciliator within five days after the board order, the board shall on the sixth day after its order appoint a conciliator from a list of qualified persons maintained by the board or shall request a list of qualified conciliators from the American arbitration association and appoint therefrom.

(2) Public employees other than those listed in division (D)(1) of this section have the right to strike under Chapter 4117. of the Revised Code provided that the employee organization representing the employees has given a ten-day prior written notice of an intent to strike to the public employer and to the board, and further provided that the strike is for full, consecutive work days and the beginning date of the strike is at least ten work days after the ending date of the most recent prior strike involving the same bargaining unit; however, the board, at its discretion, may attempt mediation at any time.

(E) Nothing in this section shall be construed to prohibit the parties, at any time, from voluntarily agreeing to submit any or all of the issues in dispute to any other alternative dispute settlement procedure. An agreement or statutory requirement to arbitrate or to settle a dispute pursuant to a final offer settlement procedure and the award issued in accordance with the agreement or statutory requirement is enforceable in the same manner as specified in division (B) of section 4117.09 of the Revised Code.

(F) Nothing in this section shall be construed to prohibit a party from seeking enforcement of a collective bargaining agreement or a conciliator's award as specified in division (B) of section 4117.09 of the Revised Code.

(G) The following guidelines apply to final offer settlement proceedings under division (D)(1) of this section:

(1) The parties shall submit to final offer settlement those issues that are subject to collective bargaining as provided by section 4117.08 of the Revised Code and upon which the parties have not reached agreement and other matters mutually agreed to by the public employer and the exclusive representative; except that the conciliator may attempt mediation at any time.

(2) The conciliator shall hold a hearing within thirty days of the board's order to submit to a final offer settlement procedure, or as soon thereafter as is practicable.

(3) The conciliator shall conduct the hearing pursuant to rules developed by the board. The conciliator shall establish the hearing time and place, but it shall be, where feasible, within the jurisdiction of the state. Not later than five calendar days before the hearing, each of the parties shall submit to the conciliator, to the opposing party, and to the board, a written report summarizing the unresolved issues, the party's final offer as to the issues, and the rationale for that position.

(4) Upon the request by the conciliator, the board shall issue subpoenas for the hearing.

(5) The conciliator may administer oaths.

(6) The conciliator shall hear testimony from the parties and provide for a written record to be made of all statements at the hearing. The board shall submit for inclusion in the record and for consideration by the conciliator the written report and recommendation of the fact-finders.

(7) After hearing, the conciliator shall resolve the dispute between the parties by selecting, on an issue-by-issue basis, from between each of the party's final settlement offers, taking into consideration the following:

(a) Past collectively bargained agreements, if any, between the parties;

(b) Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;

(c) The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;

(d) The lawful authority of the public employer;

(e) The stipulations of the parties;

(f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution procedures in the public service or in private employment.

(8) Final offer settlement awards made under Chapter 4117. of the Revised Code are subject to Chapter 2711. of the Revised Code.

(9) If more than one conciliator is used, the determination must be by majority vote.

(10) The conciliator shall make written findings of fact and promulgate a written opinion and order upon the issues presented to the conciliator, and upon the record made before the conciliator and shall mail or otherwise deliver a true copy thereof to the parties and the board.

(11) Increases in rates of compensation and other matters with cost implications awarded by the conciliator may be effective only at the start of the fiscal year next commencing after the date of the final offer settlement award; provided that if a new fiscal year has commenced since the issuance of the board order to submit to a final offer settlement procedure, the awarded increases may be retroactive to the commencement of the new fiscal year. The parties may, at any time, amend or modify a conciliator's award or order by mutual agreement.

(12) The parties shall bear equally the cost of the final offer settlement procedure.

(13) Conciliators appointed pursuant to this section shall be residents of the state.

(H) All final offer settlement awards and orders of the conciliator made pursuant to Chapter 4117. of the Revised Code are subject to review by the court of common pleas having jurisdiction over the public employer as provided in Chapter 2711. of the Revised Code. If the public employer is located in more than one court of common pleas district, the court of common pleas in which the principal office of the chief executive is located has jurisdiction.

(I) The issuance of a final offer settlement award constitutes a binding mandate to the public employer and the exclusive representative to take whatever actions are necessary to implement the award.

Effective Date: 06-26-2003; 01-27-2005