

IN THE SUPREME COURT OF OHIO

State Employment Relations Board,

and

City of Cincinnati,

Appellees,

v.

Queen City Lodge No. 69,
Fraternal Order of Police,

Appellant.

Case No. 2007-2269

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

REPLY BRIEF OF APPELLANT
QUEEN CITY LODGE NO. 69, FRATERNAL ORDER OF POLICE

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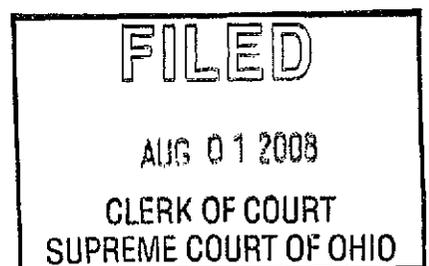


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I. Introduction

The merit briefs submitted by the Appellees and Amicus Curiae contain arguments and issues not previously addressed in Appellant's merit brief. Appellant submits this reply brief in response. For the reasons set forth herein, in addition to the argument contained in Appellant's merit brief, Appellant respectfully requests this Court reverse the Court of Appeals split decision.

II. City's Brief

A. City's Propositions of Law I, II and III

The City offers three new Propositions of Law that have not been addressed by the FOP. Proposition of Law No. I alleges that the unfair labor practice charge was not ripe and Proposition of Law No. II alleges that SERB lacks jurisdiction over untimely unfair labor practice charges. (Appellee City's Brief pp. 7-8) This Court should not address these issues because the City did not raise these arguments with the Court of Appeals. *Foran v. Fisher Foods, Inc.* (1985), 17 Ohio St. 3d 193, 194; *Hoffman v. Staley* (1915), 92 Ohio St. 505. Additionally, the City cites no law to support its position and SERB specifically determined that the Unfair Labor Practice Charge was timely filed. (Appx. p. 40)

The City's Proposition of Law III claims that the unfair labor practice charge is moot because it can no longer be redressed. (Appellee City's Brief p.8) This argument is based solely on the City's improper focus on one individual. However, the unfair labor practice was filed based on the City's implementation of the Charter Amendment to members of a bargaining unit covered by a collective bargaining agreement: Assistant Police Chiefs. The appropriate redress would include a Cease and Desist Order prohibiting implementation of the Charter Amendment as to the Assistant Police Chiefs.

B. City's Proposition of Law No. IV

The City blatantly attempts to mislead this Court by stating, “[f]rom the time of the Charter Amendment’s enactment, the City’s position has been that newly-appointed assistant police chiefs are subject to the terms of the collective bargaining agreement, including discipline and termination procedures.” (Appellee City’s Brief p.3) To the contrary, the City has refused to acknowledge that “newly-appointed” assistant chiefs are covered by the collective bargaining agreement. The City actually negotiated individual employment contracts with newly appointed assistant chiefs that contained terms different from and conflicting with the collective bargaining agreement. The City’s actions resulted in arbitrations, unfair labor practices and litigation.¹

On June 26, 2008, the City officially acknowledged for the first time that newly appointed assistant police chiefs are covered by the collective bargaining agreement by filing a Partial Voluntary Dismissal in Hamilton County Common Pleas Court Case No. A0711489. (City Supp. p. 109) In that case, the City had appealed SERB’s determination that the City committed an unfair labor practice when it bypassed the FOP and negotiated individual employment contracts with Assistant Police Chiefs.

The City attempts to cloud the issue before this Court by focusing solely on the promotional process and the alleged impact of the Arbitrator’s decision relating to Captain

¹ Grievance No. 27-05 related to the individual employment contract for Assistant Chief Michael Cureton. The City appealed the arbitration decision to Hamilton County Common Pleas Case No. A0605925 and the First District C0700178, before voluntarily dismissing the appeal. Grievance No. 27-05 related to the individual employment contract for Assistant Chief Vincent Demasi. The City objected to arbitration by filing for Injunction and Declaratory Judgment in Hamilton County Common Pleas Case No. A0509129 and the First District C00600290. Unfair Labor Practice 2005-ULP-03-0126 concerns the City’s attempts to remove the assistant chiefs from the bargaining unit through statutory impasse procedures and 2005-ULP-09-0482 concerns the individual employment contracts of Cureton and Demasi.

Gregoire. The ULP charge filed by the FOP included both the promotional process and the grievance procedure and did not even name Captain Gregoire. The Arbitrator's decision in the grievance relating to Captain Gregoire is not determinative on the issues raised in the ULP. The crux of the Arbitrator's decision is that Lt. Col. Ronald Twitty did not voluntarily retire on September 10, 2002. (City Supp. 0025) SERB clearly recognized this fact stating, "Arbitrator Cohen found that Section 22 of the CBA – specifically the "voluntary cessation" language – is not applicable to the facts of this grievance." (Appx. p.33) The arbitrator's decision does not eliminate the clear conflict between the Charter Amendment and the language relating to promotions in the collective bargaining agreement. In the event that a future Assistant Chief does voluntarily cease his duties, the contract language would undoubtedly apply and mandate promotion from a civil service list. In any event, it is well established that arbitration awards are not binding on future arbitrators, much less the Ohio Supreme Court.

The Court of Appeals and SERB ignore the clear conflict between the CBA and the Charter Amendment. There is substantial evidence in the record that a conflict does exist. Article VII, § 22 of the CBA states, in relevant part:

Upon the effective date of the officer's actual voluntary cessation of the duties of said position, such position shall immediately become vacant and **shall be immediately filled from the existing promotional eligibility list for that officer's rank or shall be filled through the competitive promotional examination process mandated by state civil service law.** (Appellant Supp. p.65-66, emphasis added)

The trial court properly determined that SERB's finding that the Charter Amendment does not conflict with the Agreement was unreasonable.

In addition to the promotion language in the collective bargaining agreement, the longstanding past practice of the parties is to fill vacancies through the civil service law

using the Rule of 1. This Court has held that a past practice is binding on parties to a collective bargaining agreement when it is unequivocal, clearly enunciated and followed for a reasonable period of time as a fixed and established practice accepted by both parties. *Assn. of Cleveland Fire Fighters, Local 93 of IAFF v. Cleveland* (1999), Ohio St.3d 476, syllabus. The parties stipulated that they have historically followed the “Rule of 1” when filling promotional vacancies. This fact is reinforced by the Consent Decree signed by the parties in 1987 which states in relevant part: “All positions to be filled in the ranks above Sergeant and below Police Chief in the Cincinnati Police Division shall be filled by rank order promotion from the applicable eligibility list. . .” (Appellant’s Supp. p. 182) The promotional process for Assistant Police Chiefs undoubtedly falls within the longstanding past practice analysis articulated by the Supreme Court.

The City also argues that “unclassified employees may be in collective bargaining units.” (City’s brief p. 11) The Charter Amendment states, “assistant police chiefs shall be in the unclassified civil service and exempt from all competitive examination requirements.” (Appellant’s Supp. p.51) However, the terms and conditions contained in the collective bargaining agreement include civil service protection and specifically, the right to appeal discharges and short term suspensions to the Cincinnati Civil Service Commission. (Appellant’s Supp. p. 57) “Employees in the unclassified service hold their positions at the pleasure of the appointing authority, may be dismissed from their employment without cause and are afforded none of the procedural safeguards available to those in the classified service.” *Rose v. Ohio Dept. of Rehab. & Corr.* (2007), 173 Ohio App.3d 767, 774, 2007-Ohio-6184; citing *Suso v. Ohio Dept. of Dev.* (1993), 93 Ohio App.3d 493, 499.

The City has now stipulated that newly appointed Assistant Police Chiefs are covered by the collective bargaining agreement.² (City Supp. p. 109) As a result, Assistant Chiefs must now be considered classified employees in order to be covered by those provisions of the collective bargaining agreement that provide for appeals to the Cincinnati Civil Service Commission. City Council acknowledged the conflict in a December 18, 2002 motion, stating, “Unfortunately, the contract that has been negotiated and recommended to us by the Administration contradicts both the spirit and language of Issue 5 and the consequent Charter change.” (Appellant’s Supp. p.146) Council further stated, “While the very definition of the term ‘unclassified’ is that they can not appeal through civil service, the contract gives that precise right back.” (Appellant’s Supp. p. 147) In essence, the City has stipulated that the Charter Amendment conflicts with the collective bargaining agreement. Therefore, the Charter Amendment can not be applied to the assistant police chiefs.

III. SERB’s Brief

SERB argues that the trial court’s decision in this case would have 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 a citywide vote.” (SERB Brief p. 18) SERB ignores the exception articulated in *Toledo* that allows a CBA to be modified without negotiations when “exigent circumstances” exist. Certainly if the Charter Amendment was proposed to alleviate a crisis, then the exigent circumstance exception provision may be appropriate.

² The City’s stipulation is based on its Partial Voluntary Dismissal of Hamilton County Common Pleas Case No. A0711489. The Magistrate’s Decision was issued on June 30, 2008. The Magistrate deferred to this Court “regarding the propriety, enforceability, or relevance of Issue 5 to this appeal.” (Magistrate’s Decision, p. 7, Attached as “Appendix A”)

However in this case, SERB specifically determined that “this case does not involve the ‘exigent circumstances’ exception.” (Appx. p.54)

SERB and the City argue that the Charter Amendment was the “will of the people.” SERB credits the citizen’s commission, Cincinnati Community Action Now (“CAN”) for proposing the change to the selection process for Assistant Police Chiefs. (Appellee SERB’s Brief p.1) However, City Council proposed the idea before CAN was created. (SERB Supp. p.140) The Charter Amendment was the will of City Council, but for City Council placing the Amendment on the ballot, there would be no Charter Amendment. The dissenting opinion in the Court of Appeals appropriately stated:

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 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 terms and conditions of employment with a union and then shortly thereafter pass legislation that conflicts with those terms. (App. Op. p. 16, ¶ 48)

Finally, SERB argues that any conflict between the collective bargaining agreement and the Charter Amendment relating to the grievance procedure has already been resolved in the FOP’s favor in *Cincinnati II*. (SERB’s Brief p. 16) The City appealed SERB’s decision in *Cincinnati II* to the Hamilton County Common Pleas Court. In the Magistrate’s Decision issued on June 30, 2008, the Magistrate deferred to this Court “regarding the propriety, enforceability, or relevance of Issue 5 to this appeal.”³ (Appendix “A” p. 7) Even SERB recognizes that the Charter Amendment conflicts with the collective bargaining agreement’s grievance procedure including the right to appeal disciplinary action to the Cincinnati Civil Service Commission. The Charter Amendment can not be

³ The City has filed Objections to the Magistrate’s Decision. SERB and the FOP have filed responses contra to the City’s Objections.

applied in any manner as to Assistant Police Chiefs.

IV. Amicus Curiae Briefs

The Amicus Curiae argue that the voters should be considered a higher level legislative authority based on *City of Eastlake v. Forest City Enterprises, Inc.* (1976), 426 U.S. 668. However, *City of Eastlake* does not govern this dispute. At issue in *Eastlake* was a Charter Amendment that changed a zoning ordinance.

In the present case, the Charter Amendment altered a collective bargaining agreement that impaired the City's contractual obligations. Article II, Section 28 of the Ohio Constitution states in part: "[t]he general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts..." City Council has the authority to approve labor agreements. The voters of Cincinnati are not aware of the terms and conditions contained in the numerous City labor agreements. The trial court succinctly stated:

By enacting the ordinance in question, the City put in motion a process which ultimately modified the existing CBA without the negotiation by and agreement of the Union. The City, through SERB, thus comes before the court with unclean hands. The court cannot condone a procedure allowing any 'legislative body' to place a measure on the ballot that would unilaterally modify a CBA term to which it is a party, and then absolve itself of culpability through a plebiscite's veneer of legitimacy. Such procedures would undoubtedly provide a strong disincentive for legislative bodies to bargain with their union employees in good faith. Such a course of action therefore contradicts the spirit of, and is inconsistent with, the objectives of Chapter 4117 of the Revised Code. (Appx. pp. 30-31)

Allowing the voters to approve the Charter Amendment proposed by City Council violates Article II, Section 28 of the Ohio Constitution and is contrary to Ohio Rev. Code §4117.22.

The Amicus Curiae Ohio Public Employer Labor Relations Association ("OHPELRA") also argues that the trial court's decision is fully reviewable by the Court of

Appeals. (OHPELRA Brief p.4) However, the proper standard of review was set forth by this Court as follows:

In reviewing an order of an administrative agency, an appellate court's role is more limited than that of a trial court reviewing the same order. It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. The appellate court is to determine only if the trial court has abused its discretion. An abuse of discretion " * * * implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency." ... Absent an abuse of discretion on the part of the trial court, a court of appeals must affirm the trial court's judgment...

The fact that the court of appeals, or this court, might have arrived at a different conclusion than did the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.

Lorain City Bd. of Edn. v. State Emp. Relations Bd. (1988), 40 Ohio St.3d 257, 261.

Although the majority of the Court of Appeals stated that the "trial court abused its discretion," it did not offer any of the "approved criteria" for finding an abuse of discretion. (Appx. p 14) The trial court clearly articulated that SERB's ruling was unreasonable and not entitled to deference. (Appx. pp. 24, 30, 31) The majority of the Court of Appeals simply disagreed with the trial court and applied the wrong standard of review.

V. Conclusion

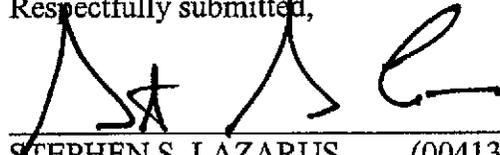
If the Court of Appeals decision is upheld, municipalities can unilaterally change unfavorable provisions contained in collective bargaining agreements by simply voting to place selected issues before voters. Notably absent from the City's proposal is any discussion about giving back to the Union gains made by the City in exchange for the unfavorable provisions put to the voters. Such a shell game totally undercuts the collective bargaining process. The FOP, by law, does not have the same authority to place an unfavorable contract provision on the ballot by a vote of their leadership. The Court of Appeals dissenting opinion appropriately quoted this Court's decision in

Mahoning County Bd. of Mental Retardation & Developmental Disabilities v. Mahoning County TMR Education Assoc. (1986), 22 Ohio St.3d 80, 84:

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 employers to honor their contractual obligations to their employees just as the courts require employees to honor their contractual obligations to their employers. (Appx. p.19)

Appellant respectfully requests this Court reverse the decision of the First District Court of Appeals and reinstate the decision of the Hamilton County Common Pleas Court finding that the City committed an Unfair Labor Practice when it unilaterally implemented the Charter Amendment as to the Assistant Chiefs.

Respectfully submitted,



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CERTIFICATE OF SERVICE

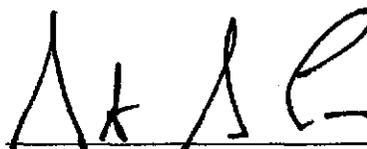
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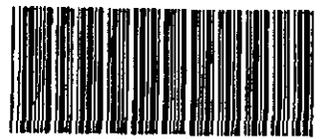
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APPENDIX “A”



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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF CINCINNATI, OHIO,	:	Case No. A0711489
Plaintiff-Appellant,	:	Judge Helmick
v.	:	
STATE EMPLOYMENT RELATIONS BOARD, et al.,	:	<u>MAGISTRATE'S DECISION</u>
Defendants-Appellees.	:	

RENDERED THIS 27TH DAY OF JUNE, 2008.

This case involves an appeal from the State Employment Relations Board's ("SERB") Opinion 2007-003 mailed December 3, 2007, wherein SERB found the City of Cincinnati ("City") violated R.C. "§§ 4117.11(A)(1) and (A)(5) in Case No. 2005-ULP-03-0126 by insisting to impasse on its proposal to remove the Assistant Police Chiefs from an deemed-certified bargaining unit, [and] that the City violated O.R.C. §§ 4117.11(A)(1) and (5) in Case No. 2005-ULP-09-0482 by unilaterally negotiating individual 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)."¹ The appeal was filed pursuant to R.C. § 4117.13(D).

By agreement of the City and SERB, the Queen City Lodge No. 69, Fraternal Order of Police ("Union") was allowed to intervene. Oral arguments were made before the Common Pleas Magistrate on May 28, 2008, at which time the appeal was taken under submission.

¹ / SERB Opinion 2007-003, § III Conclusion.

BACKGROUND

This is another appeal originating from the City's November 2001 Charter Amendment ("Issue 5") which removed the positions of Police Chief and Assistant Police Chief from the classified civil service. Future vacancies to said positions would be made by the City Manager instead of through a process known as "the Rule of 1". A thorough factual recitation is contained in the SERB Opinion.²

The first issue involves the appointments of Captains Michael Cureton and Vincent Demasi to the position of Assistant Police Chief in 2005. Neither appointments were conducted in accordance with the procedures outlined in the Collective Bargaining Agreement ("CBA") then in force. The second issue involves the City's attempt to remove the position of assistant Police Chief from the Bargaining unit without the consent of the Union. Both issues ultimately resulted in the Union's filing Unfair Labor Practice charges against the City.

In its Opinion, SERB found

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 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 (5) in Case No. 2005-ULP-09-0482 by unilaterally negotiating individual employment contracts with Assistant Police Chiefs Cureton and Demasi while bypassing the [Union], 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 the [Union] 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.³

The city timely appealed. The Union intervened herein with the consent of the parties.

² / R., SERB Opinion 2007-003, § I Background.

³ / R., SERB Opinion 2007-003, § III Conclusion.

STANDARD OF REVIEW

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 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.⁴

“Substantial evidence” has been defined to mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, but less than the weight of the evidence.⁵ The trial court shall examine the evidence but must accord due deference to the factfinder.⁶ Courts must also afford due deference to SERB’s legal interpretations of Chapter 4117 of the Revised Code.⁷ Courts may not substitute their judgment for that of SERB.⁸ However, SERB’s legal interpretations lose their deferential status when they cannot be reconciled with the explicit language of the statute,⁹ or are otherwise unreasonable.¹⁰

⁴ / Ohio Rev. Code 4117.13(D) (West 2008).

⁵ / *SERB v. Pickaway County Dep’t of Human Services*, (Dec. 7, 1995), 108 Ohio App.3d 322, 326 (citing *Consolo v. Fed. Maritime Comm.* (1966), 383 U.S. 607, 619-20)(App. 4 Dist.).

⁶ / *Lorain City Sch. Dist. Bd. of Educ. v. SERB.* (1988), 40 Ohio St.3d 257, 260.

⁷ / *Id.* at ¶ 2 of the syllabus.

⁸ / *City of Hamilton v. SERB* (1994), 70 Ohio St. 3d 210.

⁹ / *SERB v. Adena Local School Dist. Bd. of Education* (1993), 66 Ohio St. 3d 485.

¹⁰ / *State ex rel. Calabreze v. Nat’l Lime and Stone Co.* (1994), 68 Ohio St.3d 377, 382.

DISCUSSION

The City makes the following arguments as to Case No. 2005-ULP-03-0126 (collective bargaining regarding Assistant Police Chiefs): 1) SERB's determination that only the three methods recognized under uncodified law for modifying a deemed-certified unit is contrary to the statutory provisions of Chapter 4117;¹¹ 2) SERB's determination that the City failed to bargain in good faith when it attempted to change the composition of collective bargaining unit is not supported by substantial evidence;¹² 3) SERB erred when it determined that the composition of the collective bargaining unit was a permissive bargaining topic;¹³ and 4) the Union waived its right to assert that the City committed an Unfair Labor Practice.¹⁴ The City dismissed its appeal as to Case No. 2005-ULP-0482.¹⁵ The court addresses each argument as to Case No. 2005-ULP-03-0126 in turn.

Deemed-Certified Unit

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 representation shall be deemed certified until challenged by another employee organization under the provision of the act and the State Employment Relations Board has certified an exclusive representation.¹⁶

¹¹ / City Br. at 4-8.

¹² / City Br. at 8-10.

¹³ / City Br. at 10-11.

¹⁴ / City Br. at 11-12.

¹⁵ / Appellant's Partial Vol. Dis., Jun. 26, 2008.

¹⁶ / R., SERB Opinion 2007-003, § II Discussion (quoting Section 4(A) of Am.Sub.S.B. No. 133, 140 Ohio Laws, Part I, 336, 367).

Case law has established three means of altering the composition of a deemed-certified bargaining unit: 1) challenge by a rival union and subsequent SERB certification,¹⁷ 2) mutual agreement of the parties through a joint petition to SERB,¹⁸ or through a mutual agreement by the parties to submit the dispute to a grievance procedure specified in their CBA.¹⁹ The City's attempt to establish a fourth means, through the impasse procedures outlined in chapter 4117, has not been recognized by any court. This court shall not be the first. SERB's decision is based on substantial evidence on the record.

Good-faith Bargaining

The City argued it did not bargain in bad faith. SERB utilized the 'totality of the circumstances' test when reviewing the City's bargaining conduct.²⁰ SERB outlined a litany of City activity during the bargaining process, along with relevant statutory and administrative law authority, to find that the City bargained in bad faith. The court finds SERB's finding in this regard is based on substantial evidence on the record and specifically denies the City's arguments pertaining to the CBA's 'recognition clause' and its claim that SERB made a factual error in regards to any Tentative Agreement between the parties.

Mandatory v. Permissive Bargaining

SERB found that "[t]he 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

¹⁷ / *Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Emp., et al., v. City of Cincinnati* (1994), 69 Ohio St.3d 677, at syllabus.

¹⁸ / *State ex rel. Brecksville Edn. Assn. v. SERB* (1996), 74 Ohio St.3d 665, at syllabus.

collective bargaining.”²¹ SERB cited federal case law interpreting the National Labor Relations Act (“NLRA”) in support of its determination.²² The City notes SERB’s position is contrary to its own case law pertaining to permissive bargaining and that SERB’s use of the NLRA is non-persuasive, because the NLRA lacks impasse procedures similar to those contained in chapter 4117.²³ SERB argues the cases the City references are not on point. SERB alternatively asserted that, even if the recognition clause was the subject of permissive bargaining, a conciliator could not have found in the City’s favor because the composition of deemed-certified units can only be modified by one of the three methods noted above.²⁴ The court gives due deference to SERB’s Order and refrains from substituting its judgment for SERB’s in this matter.

Waiver

The City cites three Union actions for the proposition that the Union waived its right to bring the instant Unfair Labor Practice. First, the Union agreed to submit various Issue 5 positions to the Factfinder. Next, the City claims the matter has been previously submitted to a conciliator in prior negotiations. Finally, the City argues the Union bargained its own ‘anti-Issue 5’ issues.²⁵ SERB argues such actions were merely responded to the City’s provocations and cannot be considered ‘bargaining’. The Union asserts it objected to “taking bargaining unit makeup to fact-finding and conciliation.”²⁶

¹⁹ / *Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Emp., et al., v. SERB* (2000), 88 Ohio St.3d 460, at syllabus.

²⁰ / R., SERB Opinion 2007-003, § II Discussion at 15.

²¹ / R., SERB Opinion 2007-003, § II Discussion at 19.

²² / R., SERB Opinion 2007-003, § II Discussion at 19.

²³ / City Br. at 10-11.

²⁴ / SERB Br. at 11.

²⁵ / City Br. at 11.

²⁶ / Unit Br. at 16.

Upon review of the evidence on the record, the court finds the Union did not waive its right to bring this Unfair Labor Practice.

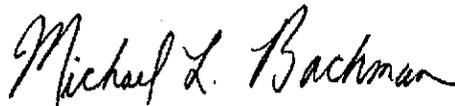
Issue 5

Finally, the court shall defer on rendering any opinion concerning arguments raised by the parties regarding the propriety, enforceability, or relevance of Issue 5 to this appeal, as the Ohio Supreme Court is scheduled to hear that issue shortly.²⁷

Upon review of the entire record, the written briefs, and the arguments of counsel, the court finds SERB's findings of fact are supported by substantial evidence and are not otherwise unreasonable.

DECISION

SERB Opinion 2007-003 is AFFIRMED. SERB Case No. 2005-ULP-03-0126 shall be ENFORCED in accordance with the provisions of R.C. § 4117.13(D). SERB Case No. 2005-ULP-0482 shall be ENFORCED due to the City of Cincinnati's voluntary dismissal of its appeal on this issue.



**MICHAEL L. BACHMAN
MAGISTRATE
COURT OF COMMON PLEAS**

NOTICE

Objections to the Magistrate's Decision must be filed within fourteen days of the filing date of the Magistrate's Decision. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b).

²⁷ / Ohio Supreme Court case no. 2007-2269.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT COPIES OF THE FOREGOING DECISION HAVE BEEN SENT BY ORDINARY MAIL TO ALL PARTIES OR THEIR ATTORNEYS AS PROVIDED ABOVE.

Date: 6-30-08 Deputy Clerk: 