[Cite as *Cleveland v. State Emp. Relations Bd.*, 2024-Ohio-4787.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CITY OF CLEVELAND, :

Plaintiff-Appellant, :

No. 113137

v. :

STATE EMPLOYMENT RELATIONS BOARD, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED October 3, 2024

Administrative Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-22-967903

Appearances:

Zashin & Rich Co., L.P.A., and David P. Frantz, *for appellant*.

Dave Yost, Ohio Attorney General, Lori J. Friedman, Principal Assistant Attorney General, and James C. Cochran, Senior Assistant Attorney General, *for appellee* State Employment Relations Board.

Muskovitz & Lemmerbrock, L.L.C., Ryan J. Lemmerbrock, and Brooks W. Boron, *for appellee-intervenor* Cleveland Association of Rescue Employees.

ANITA LASTER MAYS, J.:

{¶ 1} Plaintiff-appellant City of Cleveland (the "City") appeals the trial court's judgment affirming the decision of defendant-appellee State Employment Relations Board (the "SERB") in favor of defendant-appellee union Cleveland Association of Rescue Employees (the "Union" or "CARE"). The court upheld SERB's finding that the City violated R.C. 4117.11(A)(5) by refusing to bargain collectively with the Union over the effects of the installation of dashboard audio/visual cameras in the City's emergency medical service ("EMS") vehicles ("ambulances").

{¶ 2} The City does not appeal the trial court's finding that SERB's order directing that the City and Union bargain in good faith over the effects of dashboard cameras in the ambulances was moot due to the City's decision to remove the cameras.

{¶ 3} For the following reasons, we affirm the trial court's judgment.

I. Background

{¶ 4} The Union is the exclusive bargaining representative for full-time emergency medical technicians, dispatchers, and paramedics employed by the City. The Union and City were parties to a collective bargaining agreement ("CBA").

{¶ 5} On August 30, 2021, the City informed the Union of its determination to implement a pilot program on September 7, 2021, that involved the installation of dashboard audio/video cameras in two City ambulances. The City advised that the dashboard cameras would be used to improve the efficiency and effectiveness of

services and to provide information regarding ambulance accidents. One camera would face forward from the cab of the ambulance, and one would face into the cab. Activation of sirens, lights or crash sensors or backing up the ambulance would trigger the camera's audio/video features.

{¶ 6} On September 2, 2021, the Union responded with its concerns. Issues included the following: when would the dashboard cameras and microphones be activated, who would be able to access the footage, how would the footage be used, Health Insurance Portability and Accountability Act of 1996 ("HIPAA") compliance, system and data storage costs, service contracts requirements, use of the dashboard cameras for disciplinary concerns, and privacy issues for employees and patients.

{¶ 7} On September 8, 2021, the Union informed the City, "CARE suggests that the parties address this issue in good faith together during the upcoming collective bargaining negotiations six (6) months from now. However, if the City would rather bargain the matter now, it must do so in good faith and to an agreement."

{¶ 8} On September 13, 2021, the City responded that under the enumerated rights and waiver language contained in the CBA ("CBA Art. 3"), the City had no obligation to bargain installation and use of the dashboard cameras. The City advised that no meeting request had been made by the Union, "[h]owever, in response to your request, the City is willing to meet and confer with representatives of CARE and review any concerns or suggestions they have regarding this pilot

program." The same day, the Union responded that it did not believe a meeting would be productive if the City did not acknowledge its obligation to bargain the City's unilateral decision to install dashboard cameras in the ambulance units to an agreement.

{¶ 9} On September 17, 2021, the Union was notified that the dashboard cameras had been installed on Trucks 17 and 7, but the dashboard cameras would not become operational until a notice was published and distributed to the Union. Three Union members submitted affidavits stating the dashboard cameras were activated and recorded approximately 30 hours of footage over a month. The City advised that activation was never authorized. The City eventually decided it would not initiate the trial and removed the dashboard cameras from the vehicles.

II. SERB Proceedings

{¶ 10} On September 22, 2021, the Union filed an unfair labor practice ("ULP") charge alleging the City's unilateral decision to install the dashboard cameras violated R.C. 4117.11(A)(1) and (A)(5). It is a ULP for public employers to "[i]nterfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code . . . or the adjustment of grievances. . . ." R.C. 4117.11(A)(1). It is also a ULP to "[r]efuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to Chapter 4117. of the Revised Code." R.C. 4117.11(A)(5).

{¶ 11} On May 19, 2022, SERB found probable cause to believe the City was committing, or had committed, a violation of R.C. 4117.11(A)(5) but not

4117.11(A)(1), and issued a complaint on June 3, 2022. On July 21, 2022, oral argument was held in lieu of a hearing, preceded by a series of joint stipulations, prehearing briefs, and exhibits.

{¶ 12} On August 10, 2022, SERB issued an order and opinion finding the City violated R.C. 4117.11(A)(5) by refusing to bargain collectively over the effects of the installation of dashboard cameras in the EMS vehicles. The City was ordered to cease and desist the refusal, bargain the issue, post a cease-and-desist notice, and provide an update to SERB within 20 calendar days from the effective date of the order. The City contends that SERB ignored the unrefuted evidence that the dashboard cameras had been uninstalled as substantiated by two affidavits admitted into evidence.

III. Court Proceedings

A. Stated background

{¶ 13} On August 25, 2022, the City appealed to the Cuyahoga County Court of Common Pleas pursuant to R.C. 4117.13(D). As the trial court stated, under R.C. 4117.13(D), "the court may (1) enforce SERB's order as made, (2) modify SERB's order and enforce it as modified, or (3) set aside the order, in whole or in part. But SERB's findings of fact are conclusive if they are supported by substantial evidence on the record as a whole." Journal Entry No. 153962086, p. 2 (July 31, 2024), citing *id.*

{¶ 14} The court cited SERB's findings that using the dashboard cameras materially affected the R.C. 4117.08(A) factors that provide "all matters pertaining

to wages, hours, or terms and other conditions of employment . . . are subject to collective bargaining" between a public employer and a union. However, SERB also found that the decision fell within the City's inherent managerial policy authority under R.C. 4117.08(C)(1), which permits a public employer to retain discretion to "determine matters of inherent managerial policy" which are not specifically addressed by a collective bargaining agreement. Journal Entry No. 153962086, p. 1-2 (July 31, 2024).

{¶ 15} The court noted that public employers must bargain over all matters pertaining to wages, hours, or terms and other conditions of employment pursuant to R.C. 4117.08(A) and that almost all other topics are the subject of permissive bargaining pursuant to R.C. 4117.08(C). *Id*. at p. 3.

{¶ 16} To determine whether the camera issue constituted a mandatory or permissive bargaining subject, SERB applied a three-factor balancing test:

> 1) The extent to which the subject is logically and reasonably related to wages, hours, terms, and conditions of employment;
>
> 2) The extent to which the employer's obligation to negotiate may significantly abridge its freedom to exercise those managerial prerogatives set forth in and anticipated by O.R.C. 4117.08(C), including an examination of the type of employer involved and whether inherent discretion on the subject matter at issue is necessary to achieve the employer's essential mission and its obligations to the general public; and
>
> 3) The extent to which the mediatory influence of collective bargaining and, when necessary, any impasse resolution mechanisms available to the parties are the appropriate means of resolving conflicts over the subject matter.

Journal Entry at p. 3, citing *In re SERB v. Youngstown City School Dist. Bd. of Ed.*, SERB 95-010 (June 30, 1995).

{¶ 17} SERB determined that "'although the decision to implement the installation of the dashboard cameras was a permissive subject of bargaining, the union had the right to engage in "effects" bargaining, and the City therefore committed an unfair labor practice "by its refusal to bargain the effects of its decision in violation of its good faith bargaining obligations."'" Journal Entry, p. 3, quoting SERB Opinion, Case No. 2021-ULP-09-0140, p. 9. SERB also "overruled the City's affirmative defense that the union waived its right to bargain the decision, either under the terms of the CBA or by refusing the City's offer to meet and confer to try to resolve the dispute." *Id.*

B. Decision

{¶ 18} Cleveland argued on appeal to the court that the Union waived its right to bargain the camera program effects based on the CBA provisions and by its actions in refusing to meet and confer regarding the program. Second, the City argued that it terminated the program and removed the dashboard cameras prior to SERB's decision.

1. R.C. 4117.08(C)

{¶ 19} The first ground addressed was that the "[U]nion waived any right it might have to bargain the effects of the camera program by (1) provisions in the CBA and (2) by refusing to meet and confer regarding the details of the camera program." Journal Entry p. 4.

{¶ 20} The court considered whether under R.C. 4117.08(C), a public employer's unilateral action "'affect[s] wages, hours, terms and conditions of employment'" which "is generally a factual question which will vary depending upon the employer, employees and the circumstances of the case." Journal Entry, p. 4, quoting R.C. 4117.08(C), citing *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 260 (1988). "In this case, SERB concluded this factual question — and the related question of whether the public employer's inherent managerial discretion exempted the camera program from mandatory bargaining —in favor of the union." *Id.*

{¶ 21} The court pronounced that "[h]aving considered the entire record — and even though Cleveland's brief on appeal does not explicitly challenge the correctness of the board's factual determination that the implementation of the camera program triggered the union's right to 'effects' bargaining — the board's factual finding that the camera program is a proper subject of 'effects' bargaining under R.C. 4117.08(C) is supported by substantial evidence and is affirmed." *Id.*

2. Waiver based on CBA

{¶ 22} The court stated that the City's waiver argument was based on a portion of "Article 3 Management Rights" of the CBA, described by SERB and the court as a zipper clause.

> [T]he parties voluntarily waive the right to demand new proposals on any subject or matter, not included herein, during the term of this Contract, even though such subject matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Contract.

> Notwithstanding §4117.08 of the Ohio Revised Code, the Employer is not required to bargain on any subjects — including, but not limited to, those enumerated above — reserved to and retained by the City under this Article. Therefore, the Union agrees that, during the life of this Agreement, the City shall have no obligation to bargain collectively with respect to the exercise of any rights reserved to and retained by it pursuant to either Section 4117.08(C) of the Revised Code or pursuant to this Article of this Agreement.

Journal Entry, p. 4-5, quoting CBA Art. 3.

{¶ 23} The court explained that a "'zipper'" clause is used to "promote stable" collective bargaining agreements. *Id.* at p. 5, citing *St. Bernard v. State Emp. Relations Bd.*, 1994 Ohio App. LEXIS 3271, *11 (1st Dist. July 27, 1994). "It is meant to represent an agreement that the parties have resolved all proper subjects of bargaining for the duration of the collective bargaining agreement and allows either party to decline to negotiate on otherwise bargainable subjects." *Id.*, citing *id.* "*But when a party claims waiver by virtue of a zipper clause, courts require clear and unmistakable language in the collective bargaining agreement; silence on an issue does not meet the test*." (Emphasis added.) *Id.*, citing *id.*

{¶ 24} The court further observed that the provision of CBA Art. 3 "where the parties waive the right 'to demand new proposals on any subject or matter' not specifically included in the contract would vitiate the union's statutory right under R.C. 4117.08 to bargain matters pertaining to new conditions of employment." Journal Entry at p. 5., quoting CBA Art. 3. "To interpret the clause that way would be to effectively repeal, for these parties, that section of the Ohio Revised Code. Such

an interpretation is inconsistent with public policy as evidenced by R.C. 4117.08." *Id.* at p. 5.

{¶ 25} The court specified that SERB "explicitly" considered the City's managerial rights under R.C. 4117.08(C) by applying the *Youngstown* balancing test.[1] "Finally, a purported waiver of the right to bargain on a subject or matter 'not within the knowledge or contemplation' of the parties at the time of the contract conflicts with the principle that waiver of a future right is only enforceable where the evidence is 'clear that the union consciously yielded its statutory right.'" *Id.* at p. 5-6, quoting *Lakewood v. State Emp. Relations Bd.*, 66 Ohio App.3d 387, 392 (8th Dist. 1990).

{¶ 26} Thus, the court determined that the evidence supported a finding that the Union "did not waive, by contract, a right to bargain the effects of the dashboard camera program." *Id.* at p. 6.

3. Meet and Confer Waiver

{¶ 27} The court also rejected the City's claim on appeal that the Union waived the right to bargain the scope of the program when it failed to meet and confer prior to the program's inception. The court concluded that "any suggestion the City made to 'meet and confer' was made in the context of its repeated denial that it had any obligation under law to bargain with the union about the installation of dashboard cameras." *Id.* "The union, therefore, even if it declined the suggestion

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[1] *Youngstown City School Dist. Bd. of Edn.*, SERB 95-010 (6-30-95).

to 'meet and confer' did not waive a right the existence of which the City still refuses to acknowledge, and the board's decision on this question is affirmed." *Id.*

4. Camera Removals

{¶ 28} The City argued that the two installed dashboard cameras had been removed, though 30 hours of activity was recorded without the City's knowledge, and the camera program was "discontinued leaving the City in the 'absurd scenario [of] being ordered to bargain the effects of installing something that is no longer installed.'" Journal Entry p. 6. The Union agreed that bargaining was unnecessary if the City did not intend to resume the program but maintained the SERB order was still in effect and enforceable.

{¶ 29} The court held:

> The passage of time — whether between the installation of the two cameras and (a) their removal, (b) SERB decision or (c) this court's decision — has made it impractical, if not impossible, to require the City to bargain over a condition of employment that no longer exists and is not currently proposed, and the board's decision on this question is vacated.

Id. at p. 7.

{¶ 30} Thus, the SERB order and opinion was affirmed except that the order requiring the City to "take affirmative action to bargain in good faith with the Union over the effects of the installation of dashboard cameras in the City EMS vehicles — is vacated as moot because no dashboard cameras are currently installed nor is there evidence that they will be installed in the near future." *Id.*

{¶ 31} The City appeals.

IV. Assignments of Error

{¶ 32} The City assigns two errors:

I. The trial court erred in affirming SERB's holding that the Union did not waive, through the language of the CBA, any right to bargain the effects of the City's installation of the dash cameras.

II. The trial court erred in affirming SERB's holding that the Union did not waive, through its actions, any right to bargain the effects of the City's installation of the dash cameras when it refused the City's offer to meet and confer unless the City agreed to abandon its legal position and bargain the decision and effects to an agreement.

V. Standard of Review

{¶ 33} The common pleas court is charged under R.C. 4117.13(D) with determining whether SERB's findings were supported by substantial evidence. *Lorain,* 40 Ohio St.3d at 260. "The findings of the board as to the facts, if supported by substantial evidence, on the record as a whole, are conclusive." R.C. 4117.13(B).

{¶ 34} "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." *Lorain* at 260. "The appellate court is to determine only if the trial court has abused its discretion." *Id.* If no abuse of discretion occurred, we must affirm the judgment of the trial court. *Id.*, citing *Rohde v. Farmer*, 23 Ohio St.2d 82 (1970). An "abuse of discretion" occurs where "a court exercise[s] its judgment, in an unwarranted way, in regard to a matter over which it has discretionary authority." *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35.

{¶ 35} Until recently, courts were required to afford due deference to SERB's interpretation of R.C. Ch. 4117. *Maple Hts. v. State Emp. Relations Bd.*, 2018-Ohio-1411, ¶ 11 (8th Dist.), citing *Lorain,* paragraph two of the syllabus. "The General Assembly has entrusted SERB with the responsibility of administering the statute, and has bestowed upon it the special function of applying the statute's provisions to the complexities of Ohio's industrial life. In so doing, it has delegated to SERB the authority to make certain policy decisions." *Id.* at ¶ 11, quoting *State Emp. Relations Bd. v. Miami Univ.*, 71 Ohio St.3d 351, 353 (1994).

{¶ 36} The parties debate the impact of the Ohio Supreme Court's decision in *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, on the deference to be afforded to SERB's decision by this court. The issue in *TWISM* was whether courts are required to defer to the agency's interpretation of a statute or rule. The court pronounced that "it is the role of the judiciary, not administrative agencies, to make the ultimate determination about what the law means." *Id.* at ¶ 3. Thus, deference to the agency's statutory interpretation is not mandated though a court "may consider an agency interpretation based on its persuasive power if a statute is genuinely ambiguous." *Id.* at ¶ 43.

{¶ 37} The decision of "whether a public employer's unilateral action 'affects wages, hours, terms and conditions of employment' within the meaning of R.C. 4117.08 is generally a factual question which will vary depending upon the employer, employees and the circumstances of the case." *Lorain,* 40 Ohio St.3d at

260. "Such disputes are properly determined by SERB, which was designated by the General Assembly to facilitate an amicable, comprehensive, effective labor-management relationship between public employees and employers." *Id.*, citing *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Emp. Relations Bd.*, 22 Ohio St.3d 1 (1986). Thus, *TWISM* is inapposite to our analysis.

{¶ 38} This court has also recognized that deference is not afforded to SERB's interpretation of a collective bargaining agreement. *Lakewood,* 66 Ohio App.3d at 390, citing *Local Union 1395, Internatl. Bhd. of Elec. Workers v. Natl. Labor Relations Bd.*, 797 F.2d 1027 (C.A.D.C. 1986).

> Were we to give particular deference to SERB's interpretation of a collective bargaining agreement, "it would be free to apply different, if sufficiently reasonable, standards of interpretation than those applied by courts independently entertaining suits brought to enforce such agreements." *Local Union 1395, Internatl. Bhd. of Elec. Workers v. NLRB*, 797 F.2d 1027 (1986). *Cf. Findlay Bd. of Edn. v. Findlay Edn. Assn.*, 49 Ohio St.3d 129 (1990) (where parties bargain for an arbitrator's interpretation of a contract, the court will not disturb the arbitrator's award if it draws its essence from a collective bargaining agreement, unless the arbitrator's interpretation is unlawful, arbitrary or capricious).

Id. at 392.

VI. Discussion

A. Union waived right to bargain via CBA

{¶ 39} "[P]ublic employers must bargain over all matters pertaining to wages, hours, or terms and other conditions of employment pursuant to R.C. 4117.08(A) . . . almost all other topics are the subject of permissive bargaining pursuant to R.C. 4117.08(C). *Kolkowski v. Ashtabula Area Teachers Assn.*, 2022-

Ohio-3112, ¶ 50-51 (11th Dist.). "[A] reasonable interpretation of R.C. 4117.08(C) is that where the exercise of a management right causes a change in or 'affects' working conditions or terms of a contract, then the decision to exercise that right is a mandatory subject for bargaining." *Lorain,* 40 Ohio St.3d at 262.

> Unless a collective bargaining agreement specifically eliminates a right provided an employee by statute, an employee retains his entitlement to that right. *See State, ex rel. Clark, v. Greater Cleveland Reg. Transit Aut*h., 48 Ohio St.3d 19 (1990) (a political subdivision must afford employees' rights accrued under R.C. 9.44 unless the collective bargaining agreement specifically excludes those rights). Further, ". . . a waiver must be 'clear and unmistakable' from the terms of an agreement, and . . . where an alleged waiver is based upon negotiations, the evidence must be clear that the Union consciously yielded its statutory right." *American Cyanamid Company,* 185 N.L.R.B. 981, 985 (1970). *See, also, Internatl. Bhd. of Elec. Workers, Local 803 v. Natl. Labor Relations Bd.*, 826 F.2d 1283 (3rd. Cir. 1987).

Lakewood, 66 Ohio App.3d at 392.

{¶ 40} The City argues that SERB determined the use of the dashboard cameras is fully within the scope of its management rights under the CBA and that CBA Art. 3 clearly waived the bargaining right. As recognized by the court, SERB determined that installation of the dashboard cameras is a permissive subject of negotiation under the City's inherent managerial discretion under R.C. 4117.08(C)(1), but also found that negotiation was mandatory under R.C. 4117.08(A) to the extent the dashboard cameras affected hours, wages, and terms and conditions of employment. SERB Opinion, p. 5, 7. "[U]se of the dashboard cameras materially affects the factors set forth in R.C. 4117.08(A)" that requires mandatory bargaining. Journal Entry p. 2.

{¶ 41} The City maintains that SERB and the court misinterpreted the explicit waiver clause portion of CBA Art.3, calling it a "mere zipper clause" where the waiver clause unequivocally eliminates the City's obligation to bargain the issue. CBA Art. 3 entitled "Management Rights," provides in its entirety:

> Except as specifically limited herein, all rights are reserved to and remain vested in the City, including but not limited to the sole right to:
>
> A. Determine matters of inherent managerial policy which include but are not limited to, areas of discretion or policy such as the functions and programs of the City, standard of services, its overall budget, utilization of technology and organizational structure.
>
> B. Direct, supervise and evaluate or hire employees and to determine when and under what circumstances a vacancy exists.
>
> C. Maintain and improve the efficiency and effectiveness of the City operations.
>
> D. Determine the overall methods, process, means, or personnel by which City operations are to be conducted.
>
> E. Suspend, discipline, demote, or discharge for just cause, or lay-off, transfer, assign, schedule, promote or retain employees.
>
> F. Determine the adequacy of the work force.
>
> G. Determine the overall mission of the City.
>
> H. Effectively and efficiently manage the work force.
>
> I. Require employees to use or refrain from using specified uniforms or other tools of duty;
>
> J. Privatize or subcontract services, provided that prior to any privatization or subcontracting, the City shall meet and confer with the Union; and,
>
> K. Take actions to carry out and implement the mission of the public employer as a governmental unit. The City reserves the right to implement new or revised existing policies which do not conflict with the express terms of this Contract.

> [Zipper clause] The parties acknowledge that during the negotiations which resulted in this Contract each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law or regulation from the area of collective bargaining and that the understanding and agreements arrived at by the parties after the exercise of those rights and opportunities are set forth in this Contract. Therefore, the parties voluntarily waive the right to demand new proposals on any subject or matter, not included herein, during the term of this Contract, even though such subject matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Contract.
>
> [Waiver clause] Notwithstanding §4117.08 of the Ohio Revised Code, the Employer is not required to bargain on any subjects — including, but not limited to, those enumerated above — reserved to and retained by the City under this Article. Therefore, the Union agrees that, during the life of this Agreement, the City shall have no obligation to bargain collectively with respect to the exercise of any rights reserved to and retained by it pursuant to either Section 4117.08(C) of the Revised Code or pursuant to this Article of this Agreement.

(Emphasis added.) CBA Art. 3. SERB and the Union deny that the City's argument has merit. The court observed that SERB considered the zipper and waiver clauses.

{¶ 42} SERB argues, and the Union endorses, that the waiver clause does not negate the Union's bargaining rights or "allow a public employer to escape its effects bargaining obligations where its decision affects wages, hours, or terms and other conditions of employment" under R.C. 4117.08(A). As stated in its opinion:

> "Unless a collective bargaining agreement specifically eliminates a right provided an employee by statute, an employee retains his entitlement to the right . . . Further, . . . ' a waiver must be "clear and unmistakable" from the terms of an agreement and . . . where an alleged waiver is based upon negotiations, the evidence must be clear that the union consciously yielded its statutory right.' American Cyanamid Company (1970), 185 N.L.R.B. No. 135."

SERB Opinion, p. 10, quoting *Lakewood*, 66 Ohio App.3d at 393.

{¶ 43} The Union adds that, as the law requires, there are clear waivers in the CBA that contain bargained exceptions relating to certain mandatory bargaining issues such as work jurisdiction and privatization or subcontracting. This, the Union offers, demonstrates that certain items were, in fact, negotiated waivers.

{¶ 44} The court agreed with SERB.

> Having considered the entire record — and even though Cleveland's brief on appeal does not explicitly challenge the correctness of the board's factual determination that the implementation of the camera program triggered the union's right to "effects" bargaining — the board's factual finding that the camera program is a proper subject of "effects" bargaining under R.C. 4117.08(C) is supported by substantial evidence and is affirmed.

Journal Entry p. 4.

{¶ 45} On August 8, 2024, this court released *Cleveland v. State Emp. Relations Bd.*, 2024-Ohio-3018 (8th Dist.), where it addressed the impact of CBA Art. 3 ("*City I*"), involving the parties in this case. The City appealed the court's denial of the SERB order and decision "finding that the City violated R.C. 4117.11(A) and (A)(5) by refusing to bargain" with the Union "regarding its decision to hire part-time employees and assign bargaining-unit work to those employees." *Id.* at ¶ 1.

{¶ 46} The interpretation of CBA Art. 3 was central in addressing two of the City's arguments presented in *City I* — the identical arguments posed in the instant case. First, whether the Union waived through the CBA language the right to bargain the hiring issue; and (2) whether the Union waived the right to bargain the issue through its actions.

{¶ 47} In *City I*, the hiring issue was a mandatory bargaining subject, and in the instant case, the use of technology was a permissive managerial right, but the effects of the camera installation fell within a mandatory right. In both cases, the City argued that the Union waived its right to bargain the issue in CBA Art. 3 under the zipper and waiver clauses.

{¶ 48} We observed in *City I* that a reservation of the right to reassign bargaining unit work unilaterally would require a reservation of that right or a clear waiver in the CBA. *Id.* at ¶ 27. "'Unless a collective bargaining agreement specifically eliminates a right provided an employee by statute, an employee retains his entitlement to that right.'" *Id.*, quoting *Lakewood,* 66 Ohio App.3d at 392, citing *State ex rel. Clark v. Greater Cleveland Regional Transit Auth.*, 48 Ohio St.3d 19 (1990). In addition, the evidence must clearly demonstrate that the Union "'consciously yielded its statutory right.'" *Id.*, quoting *id.*, quoting *Am. Cyanamid Co.*, 185 N.L.R.B. 981, 985 (1970).

{¶ 49} Unlike the instant case where the managerial right to utilize technology was listed under CBA Art. 3(A) rendering the camera issue subject to permissive bargaining, the hiring issue in *City I* was not. However, both the hiring issue and the camera issue were subject to the provision of R.C. 4117.08(C) that "[t]he employer is not required to bargain on subjects reserved to the management and direction of the governmental unit *except* as affect wages, hours, terms and conditions of employment, and the continuation, modification, or deletion of an

existing provision of a collective bargaining agreement." (Emphasis added.) *See City I* at ¶ 28, Journal Entry p. 4.

{¶ 50} In *City I*, this court concluded that the CBA Art. 3 language did not "operate as an explicit waiver" of the Union's "right to require the City to bargain the reassignment of work and we find that the trial court did not abuse its discretion in determining" that the Union "did not explicitly waive the right to bargain the hiring of part-time employees who would be assigned bargaining unit work." *Id.* at ¶ 29.

{¶ 51} In the case before us, we also do not find that CBA Art. 3 clearly and expressly waives the City's obligation to bargain the effects of the camera installation. As the court acknowledged,

> [T]he term of the contract where the parties waive the right "to demand new proposals on any subject or matter" not specifically included in the contract would vitiate the union's statutory right under R.C. 4117.08 to bargain matters pertaining to new conditions of employment. To interpret the clause that way would be to effectively repeal, for these parties, that section of the Ohio Revised Code. Such an interpretation is inconsistent with public policy as evidenced by R.C. 4117.08 . . . . Finally, a purported waiver of the right to bargain on a subject or matter "not within the knowledge or contemplation" of the parties at the time of the contract conflicts with the principle that waiver of a future right is only enforceable where the evidence is "clear that the union consciously yielded its statutory right."

Journal Entry p. 4-5, quoting *Lakewood,* 66 Ohio App.3d at 392. The court did not abuse its discretion.

{¶ 52} The first assignment of error is overruled.

B. Union waived right to bargain via actions

{¶ 53} The City contends the Union's refusal of the City's offer to "to meet and confer with representatives of the Union and review any concerns or suggestions

they have regarding this pilot program" waived the Union's bargaining rights. The Union responded that it would meet if the City "acknowledged its obligation to bargain the City's unilateral decision to install the cameras in the ambulance units to an agreement." (Emphasis added.) It adds that SERB's finding that bargaining was permissive under the CBA means that the Union's refusal was flawed, and argues "the duty 'to bargain collectively'. . . is defined [under the National Labor Relations Act] as the duty to 'meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment.'" *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962).

{¶ 54} SERB distinguishes the NLRA definition of collective bargaining under 29 U.S.C. 158(d) from R.C. 4117.01(G). In Ohio "'[t]o 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. . . ." SERB states that R.C. 4117.01(G) does not use the "meet and confer" language employed in the NLRA definition, thus the City's argument is meritless.

{¶ 55} SERB cites the record that the City repeatedly refused to negotiate stating it had no obligation to bargain or no legal obligation to negotiate, an argument echoed by the Union. The Union also advances that it "immediately raised its objections to the City following the initial program notification email." Both parties assert the Union had no duty to engage in surface bargaining where the

employer offers to meet but is merely going through the motions. *Akron v. State Emp. Relations Bd.*, 2013-Ohio-1213, ¶ 7 (9th Dist.), citing *In re Springfield Local School Dist. Bd. of Edn.*, SERB No. 97-007, 1997 WL 34638264, *7 (Feb. 6, 1997).

{¶ 56} As appellees advance, in *Akron*, the court considered the objective totality of the circumstances test to determine the presence of good faith bargaining:

> In the private sector, when a party is found to have used negotiation techniques to frustrate or avoid mutual agreement, that party is said to have engaged in "surface bargaining." A party is alleged to have engaged in surface bargaining based upon the totality of its conduct at or away from the bargaining table, since an intent to frustrate an agreement is rarely articulated. "More than in most areas of labor law, distinguishing hard bargaining from surface bargaining calls for sifting a complex array of facts, which taken in isolation may often be ambiguous." "[I]f the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations." *Although an employer may be willing to meet at length and confer with the union, the employer has refused to bargain in good faith if it merely goes through the "motions" of bargaining,* such as where an employer offers a proposal that cannot be accepted, along with an inflexible attitude on major issues and no proposal of reasonable alternatives.

(Emphasis added. Internal citations omitted.) *Id.* at ¶ 7, quoting *In re Springfield Local School Dist. Bd. of Edn.*, SERB No. 97-007, 1997 WL 34638264, *7 (Feb. 6, 1997).

{¶ 57} The court rejected the City's meet and confer argument finding that the Union did not waive its bargaining right due to the City's insistence that it was not required to bargain.

> [A]ny suggestion the City made to "meet and confer" was made in the context of its repeated denial that it had any obligation under law to bargain with the union about the installation of dashboard cameras.

> The union, therefore, even if it declined the suggestion to "meet and confer" did not waive a right the existence of which the city still refuses to acknowledge . . . .

Journal Entry p. 6.

{¶ 58} We reiterate that "'a waiver must be "clear and unmistakable" . . . and . . . where an alleged waiver is based upon negotiations, the evidence must be clear that the Union consciously yielded its statutory right.'" *City I*, ¶ 32, quoting *Lakewood*, 66 Ohio App.3d at 392, quoting *Am. Cyanamid Co.*, 185 N.L.R.B at 985.

{¶ 59} The trial court did not abuse its discretion.

{¶ 60} The second assignment of error is overruled.

VII. Conclusion

{¶ 61} The trial court's judgment is affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANITA LASTER MAYS, JUDGE

EMANUELLA D. GROVES, J., CONCURS;
LISA B. FORBES, P.J., CONCURS IN JUDGMENT ONLY